114-635

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 105.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY
OF NEW YORK, PLAINTIFF IN ERROR,

vs.

DANIEL W. FORD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED OCTOBER 15, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 105.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY
OF NEW YORK, PLAINTIFF IN ERROR,

vs.

DANIEL W. FORD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error (original)	*a*	1
Citation (original)	*d*	2
Proof of service	*e*	2
Summons	1	2
Complaint	2	3
Answer	4	4
Judgment of February 18, 1879	6	5
Case and exceptions	7	5
Petition for removal	8	6
Bond	11	8
Transcript of Ohio record	13	9
Complaint in Ohio suit	14	10
Præcipe “ “	19	13
Agreement “ “	20	13
Summons “ “	22	15
Marshal's return in Ohio suit	22	15
Answer “ “	23	15
Amended complaint “ “	27	18
Amended answer “ “	29	19
Reply “ “	33	22
Verdict “ “	37	24
Motion for new trial “ “	38	25
Order denying motion in Ohio suit	40	26

JUDD & DETWEILER, PRINTERS, WASHINGTON.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 105.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY
OF NEW YORK, PLAINTIFF IN ERROR,

vs.

DANIEL W. FORD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error (original)	*a*	1
Citation (original)	*d*	2
Proof of service	*e*	2
Summons	1	2
Complaint	2	3
Answer	4	4
Judgment of February 18, 1879	6	5
Case and exceptions	7	5
Petition for removal	8	6
Bond	11	8
Transcript of Ohio record	13	9
Complaint in Ohio suit	14	10
Præcipe “ “	19	13
Agreement “ “	20	13
Summons “ “	22	15
Marshal's return in Ohio suit	22	15
Answer “ “	23	15
Amended complaint “ “	27	18
Amended answer “ “	29	19
Reply “ “	33	22
Verdict “ “	37	24
Motion for new trial “ “	38	25
Order denying motion in Ohio suit	40	26

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Certificate of Ohio circuit court clerk	40	26
Assignment of judgment	42	27
Testimony of Daniel W. Ford	44	28
Notice of appeal to general term	45	29
Order of affirmance	46	29
Judgment on affirmance	47	30
Notice of appeal to court of appeals	48	30
Clerk's certificate to return	48	31
Affidavit of no opinion	49	31
Proceedings in court of appeals	50	32
Remittitur	50	32
Proceeedings in Supreme Court	53	33
Order adapting judgment of court of appeals	53	33
Judgment	54	33
Writ of error (copy)	56	33
Citation (copy)	58	34
Proof of service (copy)	59	34
Assignment of errors	60	35
Bond	62	35
Clerk's certificate	66	37
Assignment of errors (original)	67	37

a UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court before you, or some of you, being possessed of the record and proceedings upon a remittitur from the court of appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between Daniel W. Ford, plaintiff, and The Provident Savings Life Assurance Society of New York, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and b the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-eighth day of January, in the year of our Lord one thousand eight hundred and eighty-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
M. R. WAITE,
Chief Justice Sup. C't. U. S.

c [Endorsed:] U.S. Supreme C't. The Provident Savings Life Assurance Society of New York, pl'ff, in error, *ag'st* Daniel W. Ford. Writ of error. (Original.) Stanley, Brown & Clarke, att'ys for pl'ff in error, 195 Broadway, N. Y. city. Filed Jan'y 31, 1881.

d United States of America to Daniel W. Ford, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of New York, Rensselaer county, wherein The Provident Savings Life Assurance Society of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and eighty-one.

M. R. WAITE,
Chief Justice S. P. C't U. S.

e STATE OF NEW YORK,
County of Rensselaer, City of N. Y., } *ss:*

On this 31 day of January, in the year of our Lord one thousand eight hundred and eighty-one, personally appeared Lansing Van Schoonhoven, before me, the subscriber, notary public in and for said county, and residing therein, and makes oath that he delivered a true copy of the within citation to Daniel A. Ford, known to him to be the same person within described, at the city of N. Y., in said county, and left said copy with him, and at the same time showed to him the within original citation.

LANSING VAN SCHOONHOVEN.

Sworn to and subscribed, the thirty-first day of January, A. D. 1881.

GEO. F. NICHOLS,
Notary Public, Renn. Co., N. Y.

[Endorsed:] U. S. Supreme Court. The Provident Savings Life Assurance Society of New York, pl'ff in error, ag'st Daniel W. Ford, def't in error. Original citation. Stanley, Brown, & Clarke, att'ys for pl'ffs in error, 195 Broadway, N. Y. city. (Original.) Filed Jan'y 31, 1881.

1 Supreme Court, Trial Desired in Rensselaer County.

DANIEL W. FORD
against
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated Troy, N. Y., December 3d, 1878.

SMITH, FURSMAN & COWEN,
Plaintiff's Attorneys.

Office address, No. 1 Mutual Bank Building, Troy, N. Y. Post office address, Troy, N. Y.

To the above named defendant:

2 Take notice, that upon default to appear or answer above summons judgment will be taken against you for the sum of three thousand three hundred five and $\frac{45}{100}$ dollars, with interest from the 1st day of October, 1878, besides costs.

SMITH, FURSMAN & COWEN,
Plaintiff's Attorneys, Troy N. Y.

Supreme Court; Place of Trial, Rensselaer County.

DANIEL W. FORD
ag'st
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

Above-named plaintiff complains against the above-named defendant, and for a cause of action alleges that it, the said defendant, is, and during all the time hereinafter named was, a corporation, duly organized and doing business under the laws of the State of New York, and engaged in the business of life insurance within said State of New York and elsewhere.

That heretofore and on or about the 12th day of December, 1876, one Charles Cochran, then a resident of the State of Ohio, in due form of law, commenced an action in the United States circuit court for the northern district of Ohio against the defendant in this action, praying for a judgment against said defendant for twenty thousand dollars damages; that the defendant in said action and herein duly appeared in said action and answered the petition or complaint of said Cochran, and after trial had of the issues thus joined, at 3 which the defendant therein and herein duly appeared, judgment was duly directed, and, subsequently, and on or about the 10th day of October, 1878, was duly entered and docketed, in the office of the clerk of said United States circuit court for the said northern district of Ohio, in favor of the said complainant, Cochran, and against the said The Provident Savings Life Assurance Society of New York, the defendant therein and herein, for the sum of three thousand three hundred five and $\frac{45}{100}$ dollars damages and costs.

That, as this plaintiff is informed and believes, said judgment now stands in full force and effect a valid and legal claim against the defendant herein, and has not been reversed, modified, or appealed from.

This plaintiff further alleges that on or about the 30th day of November, 1878, the said Charles Cochran, the complainant in said action and the then lawful holder and owner of said judgment, duly assigned and transferred to this plaintiff the said judgment, together with all his rights and claims thereunder and the interest due thereon.

This plaintiff further alleges that no part of the said judgment or the interest due thereon has been paid, as he is informed and verily believes.

That by reason of the facts aforesaid there is now justly due and owing to this plaintiff from the defendant herein the sum of $3,305.45, with interest thereon from the 1st day of October, 1878, for which sum plaintiff demands judgment herein against the defendant herein with costs.

SMITH, FURSMAN & COWEN,
Plaintiff's Att'ys, Troy, N. Y.

RENSSELAER COUNTY, *ss:*

Daniel W. Ford, of Troy, in said county, being duly sworn, says:
He is the plaintiff in this action, and that the foregoing complaint
is true of his own knowledge, except as to the matters therein
4 stated to be alleged upon information and belief, and as to
those matters he believes it to be true.

DANIEL W. FORD.

Sworn to before me, December 3d, 1878.

J. S. HAWLEY,
Notary Public, Rens. Co.

Supreme Court, Rensselaer County.

DANIEL W. FORD
ag'st
THE PROVIDENT LIFE ASSURANCE SOCIETY OF NEW YORK.

The answer of the Provident Life Assurance Society of New York, the defendant above named, by Stanley, Brown & Clarke, its attorneys, shows to the court:

First. The defendant admits that it is a corporation duly incorporated, and that the said Cochran took certain proceedings in the circuit court of the United States for the northern district of Ohio, praying for a judgment against the defendant, but the defendant avers that there was never any personal service of process or of any summons or petition therein upon the defendant.

The defendant, further answering, denies any knowledge or in-
formation sufficient to form a belief whether any judgment
5 was ever directed, recovered, entered, or docketed, as alleged
in the complaint, for any sum whatever, or whether any judg-
ment now stands as alleged, and it leaves the plaintiff to make such
proof in respect thereto as he shall be advised.

The defendant, further answering, denies that it has any knowledge or information sufficient to form a belief whether the said Charles Cochran, at any time, assigned or transferred to the plaintiff the alleged judgment, or whether, at the time of such alleged assignment, the said Cochran was the lawful holder or owner of said alleged judgment, and it denies that any sum is justly due or owing to the plaintiff.

Wherefore the defendant demands judgment for the dismissal of the complaint, with costs.

STANLEY, BROWN & CLARKE,
Att'ys for Deft., 195 Broadway, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

William E. Stevens, being duly sworn, says: That he is secretary of the defendant above named, and that the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WM. E. STEVENS.

Sworn to before me, this 24th day of December, 1878.

MELVIN BROWN,
Notary Public, Kings Co.

6 *Judgment, February 18th, 1879.*

Supreme Court.

DANIEL W. FORD
ag'st
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

The issues in this action having been brought on for trial before Mr. Justice Ingalls and a jury at a circuit court held in and for the county of Rensselaer, on the 18th day of February, 1879, and the issues having been tried and a verdict for the plaintiff having been duly rendered for the sum of three thousand three hundred ninety-four $\frac{15}{100}$ dollars and costs. Now, on motion of Smith, Fursman & Cowen, plaintiff's attorneys, it is adjudged that said plaintiff recover of said defendant the sum of three thousand three hundred ninety-four dollars and fifteen cents damages, with one hundred seventy-nine dollars and twenty-nine cents costs, amounting in all to the sum of three thousand five hundred and seventy-three dollars and forty-four cents, and have execution therefor.

JAMES KEENAN, *Clerk.*

7 *Case and Exceptions.*

Supreme Court, Rensselaer County.

DANIEL W. FORD
against
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

The above cause came on for trial before Mr. Justice Ingalls and a jury at the Rensselaer circuit, on February 18th, 1879, and the following proceedings were then had:

Before the jury were empanelled the court said:

"During last evening I gave this matter some attention, and

will announce my determination in the matter. There appear to be two grounds stated in the petition for transferring the case to the United States court. The first is, that it involved the construction of a United States statute. As to that we cannot see how the construction of the statute is in any sense involved; the statute, as it stands, will be adopted as the law applicable to the case. Then, as to the second ground, that the real party in interest is not upon the record, and plaintiff cannot succeed here, and that a party in Ohio is the real party in interest, and that the plaintiff in this action is only a nominal party—that question is triable here in this court, because if the real party in interest is not upon the record the plaintiff cannot succeed in the action, and hence the party as to both questions has all its rights preserved in the State court. So I can hardly see what substantial ground there is for ousting the supreme court of the State of jurisdiction. It seems to me this is not a case within the decisions which have been cited by counsel. I see no reason why it should not be tried, and why every issue is not
8 properly triable in the State court. I shall, of course, adopt the statute of the United States as the law in determining the case, and allow no contest upon that. I think I must try the case. I have put the papers on file so you will have the benefit of it. You may now put in the evidence in the case, if you desire."

Defendant's counsel duly excepted to the decision of the court.

The court then ordered a jury to be empaneled, whereupon defendant's counsel objected to the empaneling of a jury upon the ground that the cause had been transferred to the Federal court, and excepted to the holding of the court that it had not so been transferred.

A jury being then empaneled, the defendant's counsel said he desired, before the plaintiff proceeded, to be permitted to place a witness upon the stand, to prove from the records as a fact the presentment of a due and legal petition and bond, which has operated to transfer the cause to the Federal courts.

The court said the petition and bond might be considered in evidence, whereupon the same were marked by the stenographer respectively "A, S. C. R.," and "B, S. C. R."

Petition for Removal to the Circuit Court of the United States for the Northern District of New York.

Supreme Court, Rensselaer County.

DANIEL W. FORD
against
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

To said supreme court:

Your petitioner respectfully shows to this honorable court
9 that it is the defendant in the above action, and a corporation duly incorporated under the laws of the State of New York, located and having its place of business in the city of New York, and was such corporation during all the times hereinafter

mentioned, and was never organized or incorporated under any law of the State of Ohio; that the above action is brought to recover the amount of a judgment alleged to have been obtained against your petitioner in the State of Ohio, by one Charles Cochran, on the 10th day of October, 1878, in the circuit court of the United States for the northern district of Ohio, for the sum of three thousand three hundred and five dollars and forty-five cents; that said Cochran then resided and still resides in the State of Ohio; that this action is brought upon an alleged assignment of said judgment to the plaintiff above named by said Cochran, and is now pending and undetermined; that the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and involves questions arising under the laws of the United States, to wit, under section 739 of the Revised Statutes of the United States. Said section forbids "any suit to be brought by any original process before either of the United States courts against an inhabitant of the United States in any other district than that of which he is an inhabitant, or in which he shall be found at the time of serving the writ." And your petitioner avers that the said suit in Ohio was by original process, but that the said process was never served personally upon the defendant in said action in Ohio, or upon any of its officers, nor was the defendant ever an inhabitant of Ohio or found therein, and, as your petitioner verily believes, said circuit court never acquired jurisdiction, and said judgment is invalid and void, and that such want of personal service as aforesaid is alleged in the answer in the present action, and that the trial of this action will necessarily involve the construction and effect of the said law of the United States, to wit, the said 739th section of the said United States Revised Statutes.

10 *Secondly*. And your petitioners further say, as they are informed and verily believe, that the plaintiff in this action is not the real party in interest therein, but that said Cochran is the real party in interest, and that said alleged assignment is merely colorable; that it was made without any consideration and merely for the purpose of prosecuting and collecting said judgment for the benefit of said Cochran, and to avoid the necessity of said Cochran's giving security for costs as a non-resident of this State, and to embarrass, and, if possible, prevent the transfer of this action to the United States courts, and that the controversy in this action is in reality and in substance between the defendant and the said Charles Cochran, who are citizens of different States, to wit, the defendant is in law a citizen of New York, and said Cochran a citizen of Ohio.

And your petitioner offers herewith a bond, with good and sufficient surety, for entering in said circuit court of the United States, on the first day of the next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners pray this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein

will announce my determination in the matter. There appear to be two grounds stated in the petition for transferring the case to the United States court. The first is, that it involved the construction of a United States statute. As to that we cannot see how the construction of the statute is in any sense involved; the statute, as it stands, will be adopted as the law applicable to the case. Then, as to the second ground, that the real party in interest is not upon the record, and plaintiff cannot succeed here, and that a party in Ohio is the real party in interest, and that the plaintiff in this action is only a nominal party—that question is triable here in this court, because if the real party in interest is not upon the record the plaintiff cannot succeed in the action, and hence the party as to both questions has all its rights preserved in the State court. So I can hardly see what substantial ground there is for ousting the supreme court of the State of jurisdiction. It seems to me this is not a case within the decisions which have been cited by counsel. I see no reason why it should not be tried, and why every issue is not
8 properly triable in the State court. I shall, of course, adopt the statute of the United States as the law in determining the case, and allow no contest upon that. I think I must try the case. I have put the papers on file so you will have the benefit of it. You may now put in the evidence in the case, if you desire."

Defendant's counsel duly excepted to the decision of the court.

The court then ordered a jury to be empaneled, whereupon defendant's counsel objected to the empaneling of a jury upon the ground that the cause had been transferred to the Federal court, and excepted to the holding of the court that it had not so been transferred.

A jury being then empaneled, the defendant's counsel said he desired, before the plaintiff proceeded, to be permitted to place a witness upon the stand, to prove from the records as a fact the presentment of a due and legal petition and bond, which has operated to transfer the cause to the Federal courts.

The court said the petition and bond might be considered in evidence, whereupon the same were marked by the stenographer respectively "A, S. C. R.," and "B, S. C. R."

Petition for Removal to the Circuit Court of the United States for the Northern District of New York.

Supreme Court, Rensselaer County.

DANIEL W. FORD
against
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

To said supreme court:

Your petitioner respectfully shows to this honorable court
9 that it is the defendant in the above action, and a corporation duly incorporated under the laws of the State of New York, located and having its place of business in the city of New York, and was such corporation during all the times hereinafter

mentioned, and was never organized or incorporated under any law of the State of Ohio; that the above action is brought to recover the amount of a judgment alleged to have been obtained against your petitioner in the State of Ohio, by one Charles Cochran, on the 10th day of October, 1878, in the circuit court of the United States for the northern district of Ohio, for the sum of three thousand three hundred and five dollars and forty-five cents; that said Cochran then resided and still resides in the State of Ohio; that this action is brought upon an alleged assignment of said judgment to the plaintiff above named by said Cochran, and is now pending and undetermined; that the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and involves questions arising under the laws of the United States, to wit, under section 739 of the Revised Statutes of the United States. Said section forbids "any suit to be brought by any original process before either of the United States courts against an inhabitant of the United States in any other district than that of which he is an inhabitant, or in which he shall be found at the time of serving the writ." And your petitioner avers that the said suit in Ohio was by original process, but that the said process was never served personally upon the defendant in said action in Ohio, or upon any of its officers, nor was the defendant ever an inhabitant of Ohio or found therein, and, as your petitioner verily believes, said circuit court never acquired jurisdiction, and said judgment is invalid and void, and that such want of personal service as aforesaid is alleged in the answer in the present action, and that the trial of this action will necessarily involve the construction and effect of the said law of the United States, to wit, the said 739th section of the said United States Revised Statutes.

10 *Secondly.* And your petitioners further say, as they are informed and verily believe, that the plaintiff in this action is not the real party in interest therein, but that said Cochran is the real party in interest, and that said alleged assignment is merely colorable; that it was made without any consideration and merely for the purpose of prosecuting and collecting said judgment for the benefit of said Cochran, and to avoid the necessity of said Cochran's giving security for costs as a non-resident of this State, and to embarrass, and, if possible, prevent the transfer of this action to the United States courts, and that the controversy in this action is in reality and in substance between the defendant and the said Charles Cochran, who are citizens of different States, to wit, the defendant is in law a citizen of New York, and said Cochran a citizen of Ohio.

And your petitioner offers herewith a bond, with good and sufficient surety, for entering in said circuit court of the United States, on the first day of the next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners pray this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of New York, and they will ever pray, &c.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
SHEPPARD HOMANS, *President.*
WM. E. STEVENS, *Secretary.*

STATE OF NEW YORK,
City and County of New York, } *ss:*

11 Sheppard Homans, being duly sworn, says: That he is president of the Provident Savings Life Assurance Society of New York, the petitioner above named, and that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true, as deponent verily believes.
SHEPPARD HOMANS.

Sworn to before me, this February 15th, 1879.
MELVIN BROWN,
Notary Public, Kings Co.

Know all men by these presents, that we, the Provident Savings Life Assurance Society of New York, as principal, and Joseph H. Parsons and William E. Stevens, as sureties, are held and firmly bound unto Daniel W. Ford, in the penal sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Daniel W. Ford, his executors, administrators or assigns, for which payment well and truly to be made we bind ourselves and our heirs, executors and administrators, representatives, successors and assigns, jointly and severally, firmly by these presents, sealed with our seal, dated the fifteenth day of February, one thousand thousand eight hundred and seventy-nine, yet upon these conditions, the said Provident Savings Life Assurance Society of New York, having petitioned the supreme court, county of Rensselaer, State of New York, for the removal of a certain cause pending therein, wherein the said Daniel W. Ford is plaintiff, and the said The Provident Savings Life Assurance Society of New York is defendant, to the circuit court of the United States in and for the northern district of New York. Now, if the said The Provident Savings Life Assurance Society of New York, your petitioners, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was 12 wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
By SHEPPARD HOMANS, *President.* [L. S.]
JOSEPH H. PARSONS. [L. S.]
WM. E. STEVENS. [L. S.]

In presence of—
MELVIN BROWN.

STATE OF NEW YORK,
City and County of New York, } *ss:*

We, Joseph H. Parsons, of the city and county of New York, and State of New York, and William E. Stevens, of the city of Brooklyn and county of Kings, having been duly sworn, each deposes and says: I am one of the sureties named in the foregoing bond, and am a resident of the State of New York, and a householder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities, exclusive of property by law exempt from execution; that I have property in the State of New York liable to execution of the value of more than one thousand dollars.

JOSEPH H. PARSONS.
WM. E. STEVENS.

Subscribed in my presence and severally sworn to before me, this 15th day of Feb., 1879.

MELVIN BROWN,
Notary Public, Kings Co.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 15th day of February, 1879, before me, personally appeared Joseph H. Parsons, and William E. Stevens, and Sheppard Homans, to me known to be the individuals described in and who executed the foregoing bond, and acknowledged to me that 13 they executed the same, and the said Homans acknowledged to me that he executed the same as the act and deed of the Provident Savings Life Assurance Society of New York.

MELVIN BROWN,
Notary Public, Kings Co.

I approve of the sufficiency of the sureties of the within bond.
February 17th, 1879.

C. R. INGALLS,
Jus. Sup. Court.

Filed Feb. 18th, 1879 (prior to the trial).

(Defendant's counsel then objected to any further proceedings, and excepted to the ruling of the court thereupon.)

Without any formal opening, plaintiff's counsel then offered in evidence transcript of the record of the United States court for the northern district of Ohio, including a certain judgment rendered against these defendants for $3,193 damages and $112.43 costs, certified or authenticated in the following words:

At a stated term of the circuit court of the United States for the northern district of Ohio, begun and held at Cleveland, in the said district, on the first Tuesday in October, being the first day of that month, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and third.

Present: The Hon. Martin Welker, district judge.

14 In the record and proceedings of said court then and there held, among other things, appears the following, to wit:

to be removed into said circuit court of the United States in and for the northern district of New York, and they will ever pray, &c.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
SHEPPARD HOMANS, *President.*
WM. E. STEVENS, *Secretary.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Sheppard Homans, being duly sworn, says: That he is president
11 of the Provident Savings Life Assurance Society of New
York, the petitioner above named, and that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true, as deponent verily believes. SHEPPARD HOMANS.

Sworn to before me, this February 15th, 1879.

MELVIN BROWN,
Notary Public, Kings Co.

Know all men by these presents, that we, the Provident Savings Life Assurance Society of New York, as principal, and Joseph H. Parsons and William E. Stevens, as sureties, are held and firmly bound unto Daniel W. Ford, in the penal sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Daniel W. Ford, his executors, administrators or assigns, for which payment well and truly to be made we bind ourselves and our heirs, executors and administrators, representatives, successors and assigns, jointly and severally, firmly by these presents, sealed with our seal, dated the fifteenth day of February, one thousand thousand eight hundred and seventy-nine, yet upon these conditions, the said Provident Savings Life Assurance Society of New York, having petitioned the supreme court, county of Rensselaer, State of New York, for the removal of a certain cause pending therein, wherein the said Daniel W. Ford is plaintiff, and the said The Provident Savings Life Assurance Society of New York is defendant, to the circuit court of the United States in and for the northern district of New York. Now, if the said The Provident Savings Life Assurance Society of New York, your petitioners, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the
United States, if said court shall hold that said suit was
12 wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
By SHEPPARD HOMANS, *President.* [L. S.]
JOSEPH H. PARSONS. [L. S.]
WM. E. STEVENS. [L. S.]

In presence of—
MELVIN BROWN.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

We, Joseph H. Parsons, of the city and county of New York, and State of New York, and William E. Stevens, of the city of Brooklyn and county of Kings, having been duly sworn, each deposes and says: I am one of the sureties named in the foregoing bond, and am a resident of the State of New York, and a householder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities, exclusive of property by law exempt from execution; that I have property in the State of New York liable to execution of the value of more than one thousand dollars.

JOSEPH H. PARSONS.
WM. E. STEVENS.

Subscribed in my presence and severally sworn to before me, this 15th day of Feb., 1879.

MELVIN BROWN,
Notary Public, Kings Co.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 15th day of February, 1879, before me, personally appeared Joseph H. Parsons, and William E. Stevens, and Sheppard Homans, to me known to be the individuals described in and who executed the foregoing bond, and acknowledged to me that 13 they executed the same, and the said Homans acknowledged to me that he executed the same as the act and deed of the Provident Savings Life Assurance Society of New York.

MELVIN BROWN,
Notary Public, Kings Co.

I approve of the sufficiency of the sureties of the within bond.
February 17th, 1879.

C. R. INGALLS,
Jus. Sup. Court.

Filed Feb. 18th, 1879 (prior to the trial).

(Defendant's counsel then objected to any further proceedings, and excepted to the ruling of the court thereupon.)

Without any formal opening, plaintiff's counsel then offered in evidence transcript of the record of the United States court for the northern district of Ohio, including a certain judgment rendered against these defendants for $3,193 damages and $112.43 costs, certified or authenticated in the following words:

At a stated term of the circuit court of the United States for the northern district of Ohio, begun and held at Cleveland, in the said district, on the first Tuesday in October, being the first day of that month, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and third.

Present: The Hon. Martin Welker, district judge.

14 In the record and proceedings of said court then and there held, among other things, appears the following, to wit:

CHARLES COCHRAN
vs.
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK. } Law.

Be it remembered that on the 12th day of December, A. D. 1876, came the plaintiff, by W. C. McFarland, his attorney, and filed in the clerk's office of this court a certain petition in this cause, which is in the words and figures following, to wit:

Petition.

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio,

In the Circuit Court for said District.

CHARLES COCHRAN, Plaintiff,
vs.
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
Defendant.

The plaintiff, Charles Cochran, complains of the defendant, the Provident Savings Life Assurance Society of New York, and says:

That he is a citizen and a resident of the State of Ohio, and
15 of the northern district thereof, and that the defendant is a foreign corporation, organized, existing and doing business under the laws of the State of New York, and having its principal office in the city of New York. The plaintiff further says that on or about the 12th day of February, 1876, the said defendant, by and through its officers duly authorized, entered into a contract in writing with the plaintiff and O. C. Kendrick and Alonzo L. Foster (a copy of which is hereto annexed and made a part hereof), by which it was agreed that the said plaintiff and said Kendrick and Foster (who entered into a copartnership for that purpose) would act as the general agents of the defendant to procure insurance to be effected by the defendant in the States of Ohio, Indiana, Illinois, Wisconsin, Minnesota, Iowa, and Missouri. The said defendant was to furnish an office for said firm of Cochran, Kendrick & Foster in the city of Cleveland, Ohio, to pay for all medical examinations of applicants for insurance with the defendant, and to furnish and pay for all postage and for all telegrams, express charges, signs and advertising, and also to provide all necessary books for keeping accounts with the defendant and others in connection with said business.

The defendant was to pay the said firm of Cochran, Kendrick & Foster fifty per cent. of all the gross premiums on all policies issued by the defendant on the application made through the agency of said firm, the same to be computed on the basis of the defendant's published cards of ordinary life rates. When the reserve portion of the premiums were deposited in bank, forty per cent. only of the premiums were to be paid to said firm for the first year, and the residue of the ten per cent. was to be paid at the beginning of the second year. Two and one-half per cent. upon the whole life rate

was to be allowed as a collection fee upon the renewals so long as the contract should be in force. An additional allowance of two and one-half per cent. collection fee was allowed for collecting the renewals for the second year upon the whole life rate when the
16 reserve was deposited in the bank, or in lieu thereof. At the option of the said firm, their necessary traveling expenses was to be advanced on account by the defendant. Said firm of Cochran, Kendrick & Foster agreed to enter into a copartnership and take charge of the entire business of said defendant in the States before mentioned, and to devote themselves exclusively to the same, beginning with the State of Ohio and proceeding with the others as rapidly as possible, until the whole territory was occupied.

In case any of the territory should not be occupied or worked by the said firm to the satisfaction of the defendant, it was agreed that, after due consultation with the said firm, and after three months' written notice of its intention so to do, the defendant might withdraw such portion from the operation of said contract after January, 1879; but said agreement or agency could not be terminated or otherwise effected by either party prior to January, 1879, without the consent of the other.

The plaintiff avers that in pursuance of said agreement he rented his house in the city of Toledo, and removed with his family to the city of Cleveland, where he took up his residence, and entered into the copartnership aforesaid, and that said firm commenced business as agents of the defendants, opened an office and books, and began the work of obtaining assurance in the company of the defendants in Ohio, and were making preparations to pursue their labors with great zeal and diligence in the other States comprising their said territory.

That during this time they were constantly annoyed and impeded in their work by the officers of the defendant, who were frequently attempting, in violation of said agreement, to make changes, and to put a wrong construction upon the same, and finally refused to grant said firm the necessary authority to enter the States other than Ohio comprised in their said territory, and undertook to take away from them a portion of their said territory, and appoint agents of
17 their own in the same, and in a variety of ways annoyed, impeded and obstructed them in their efforts to prosecute them in their said business and make it profitable.

That on or about the 18th day of July, 1876, the defendant sent one H. L. Dunn, who is superintendent of agencies of the defendant, with full powers to arrange the difficulties which had arisen, and who was instructed to compromise with the said firm and cancel said agreement, and to make any and all contracts necessary to accomplish that purpose.

That on or about the 21st day of July, 1876, the said Dunn, acting under instructions, as aforesaid, then and there made an agreement with the plaintiff and said Kendrick and said Foster, by which said original agreement was to be cancelled and said copartnership dissolved. The consideration agreed upon between the parties, by reason of which said firm was dissolved and said contract was cancelled, was as follows, to wit:

The said Kendrick and Foster were to continue to act as agents for the defendant, under other and different terms than those mentioned in said contract, and the plaintiff was either to have the position of secretary of the defendant in the city of New York, or, in case of failure to obtain that for him, he was to be paid in lieu thereof a sum of money which would be wholly satisfactory to the plaintiff, and in full payment of all damages he had suffered by reason of giving up said contract and business, unless the defendant and the plaintiff could or would agree upon some other mode of settlement as satisfactory to him; and this agreement to take care of the plaintiff and wholly satisfy him was a part of the consideration which induced the said Kendrick and Foster to consent to a dissolution of said copartnership and to consent to a cancellation of their said agreement. Upon said mutual agreements being completed the following cancellation in substance was written upon the back of the contract: "In consideration of individual or separate contracts this day entered into between the Provident
18 Savings Life Assurance Society and Charles Cochran, Oscar C. Kendrick, and Alonzo L. Foster, this contract is hereby cancelled."

Plaintiff further says that said Dunn was to go to New York and lay the matter of his secretaryship of the defendant before the president and directors of defendant, and was to telegraph for the plaintiff within a short time to come to New York to either accept said secretaryship or to agree upon and receive an amount in money in consideration of his giving up said contract.

But the plaintiff avers that the defendant and the officers of the same wholly ignored the said agreement and refused to either give him the secretaryship of the defendant, or to pay him a sum of money, and failed and refused to telegraph him to come to New York, or in any other way to satisfy and settle with him as they had agreed to do.

Plaintiff further avers that relying wholly upon the good faith and honest intentions of the officers of the defendant, and upon the promises and agreements above set forth, made to and with him by the said Dunn, he was induced, as was said Kendrick and said Foster, to give up and cancel said original agreement, which was of great value, and that ever since said cancellation was procured the officers of the defendant have falsely, fraudulently, and maliciously endeavored to cheat and defraud him out of the value of the said contract, and have refused to satisfy or settle with him, although often requested so to do.

Plaintiff further says that he has large experience in the life assurance business; that his interest in said cancelled contract was of great value to him. That in consequence of the false, fraudulent, and dishonest representations of promises of the said Dunn, acting for and in behalf of the defendant, and by reason of the premises, he has suffered and sustained great damage, to wit, the sum of twenty thousand dollars.

Wherefore the plaintiff asks judgment against the defendant for twenty thousand dollars, his damages, as aforesaid, sustained.

W. C. McFARLAND,
Plaintiff's Attorney.

19 THE UNITED STATES OF AMERICA, } *ss:*
The Northern District of Ohio, }

Charles Cochran, being duly sworn, says: That he is the plaintiff in the above-entitled action; that the statements made and allegations contained in the foregoing petition are, as he believes, true.

CHAS. COCHRAN.

Subscribed and sworn to before me by the said Charles Cochran, this 12th day of December, 1876.

N. P. GOODHUE,
Notary Public.

Præcipe.

THE UNITED STATES OF AMERICA, } *ss:*
The Northern District of Ohio, }

In the United States Circuit Court within and for said District.

CHARLES COCHRAN, Plaintiff,
vs.
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

To the clerk:

Issue summons in this case returnable according to law, amount claimed by the plaintiff as damages for violation of a contract.

W. C. McFARLAND,
($20,000.) *Plaintiff's Attorney.*

20 *Agreement.*

This agreement made and executed this twelfth day of February, A. D. 1876, by and between the Provident Savings Life Assurance Society of New York, party of the first part, and Charles Cochran, of Toledo, Oscar C. Kendrick and Alonzo L. Foster, both of Cleveland, all in the state of Ohio, party of the second part, witnesseth:

That for the purpose of procuring insurance to be effected by said society in the States of Ohio, Indiana, Illinois, Wisconsin, Minnesota, Iowa and Missouri, it is mutually agreed by and between said parties as follows, to wit:

The party of the first part agrees to procure and properly furnish, in the city of Cleveland, a suitable general office for the transaction of its business in said States, and such other offices as from time to time it may deem it expedient to have for the proper development of said business. It will pay for all medical examinations, for all necessary exchange on moneys remitted, postage, telegrams and express charges, and for such signs and advertising as it may authorize, and it will also provide all necessary stationery and books for accounts.

It will pay to said party of the second part, in full compensation for their services, one-half of the gross first year's premiums on all kinds of policies issued by it on applications made through the agency of said party of the second part in the territory aforesaid, the same to be computed for that purpose on the basis of the company's published rates for ordinary life policies at the age of the assured, except that when the "reserve" portion of the premiums is deposited in a bank, forty per cent. only of the premium as aforesaid shall be paid the first year, and the residue (ten per cent.) shall be paid in the beginning of the second year. Two and one-half per cent. upon the whole life rate will be allowed as a collection fee upon
21 renewals, so long as this contract shall remain in force; an additional allowance of two and one-half per cent. collection fee for the second year upon the whole life rate shall be allowed said party of the second part when the reserve shall have been deposited in bank, or in lieu thereof, at the option of the said party of the second part, their necessary travelling expenses shall be advanced on account by said party of the first part. Said party of the second part agrees to form a partnership under the name of "Cochran, Kendrick & Foster," and to take charge of the entire business of said society in the States hereinbefore mentioned, and to devote themselves exclusively to the same, beginning with the State of Ohio and proceeding with the others of said States in succession, as rapidly as possible, until the whole territory is occupied.

In case any portion of said territory should not be occupied or worked by the party of the second part to the satisfaction of said society, it may, after due consultation with said party of the second part, and after three months' written notice of its intention so to do, withdraw such portion from the operation of this agreement.

This agreement may be terminated by either party after three months' notice in writing given to the other, but such notice shall not be given prior to January 1st, A. D. 1879.

THE PROVIDENT LIFE ASSURANCE SOCIETY OF NEW YORK.

Signed by SHEPPARD HOMANS, *V.-P. and Act'y.* [SEAL.]
(Signed) CHARLES COCHRAN. [SEAL.]
(Signed) OSCAR C. KENDRICK. [SEAL.]
(Signed) ALONZO L. FOSTER. [SEAL.]

Executed in presence of—
(Signed) L. W. BINGHAM.
R. J. FULLER.

Cancelled by agreement through H. L. Dunn, Esq., July 22d, 1876.

(Signed) SHEPPARD HOMANS,
V.-P. and Actuary.

22 Whereupon there was duly issued out of the clerk's office of this court a summons in this cause, which is in the words and figures following, to wit:

Summons.

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio, }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to notify the Provident Savings Life Assurance Society of New York that it has been sued by Charles Cochran in the circuit court of the United States within and for the said district, and that unless it answers by the 13th day of January, A. D. 1877, the petition of the said plaintiff against it, filed in the clerk's office of said court, at Cleveland, in said district, such petition will be taken as true, and judgment will be rendered accordingly. You will make due return of this summons on the 25th day of December, A. D. 1876.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 12th day of December, A. D. 1876, and in the 101st year of the Independence of the United States of America.

EARL BILL, *Clerk.*

Endorsed on the foregoing summons was the following:

Money only. Amount claimed by the plaintiff as damages for violation of a contract, $20,000.

Afterwards, to wit, on the twenty-first day of December, A. D. 1876, the foregoing summons was returned by the marshal endorsed as follows, to wit:

Sum.'s Return.

NORTHERN DISTRICT OF OHIO, *ss:*

23 On the 13th day of December, A. D. 1876, I made due service of this writ on the within-named Provident Savings Life Assurance Society of New York by leaving at the residence of A. L. Foster, general agent for the State of Ohio of the above-named life assurance society, a true and duly certified copy of this writ at Cleveland, Ohio.

N. B. PRENTICE, *U. S. Marshal.*
By JOHN ODELL, *Deputy.*

Afterwards, to wit, at the January term of this court, continued and held on the 3d day of February, A. D. 1877, to wit:

Jour'l B, page 387:

On motion, it is ordered that said defendant have twenty days from this date within which to answer herein.

And afterwards, to wit, on the 24th day of February, A. D. 1877, came the defendant, by its solicitors, and filed in the clerk's office of this court its answer in this cause, which is in words and figures following, to wit:

Answer.

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio, }

In the Circuit Court for said District.

CHARLES COCHRAN, Plaintiff,
vs.
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Defendants.

The defendant, the Provident Savings Life Assurance Society of New York, answers the petition of the plaintiff, Charles Cochran, and says as follows:

24 First. The defendant admits that the plaintiff is a citizen and a resident of the State of Ohio, and the northern district thereof, and that the defendant is a corporation, as alleged in the petition.

Second. Defendant admits that on or about the 12th day of February, 1876, the defendant, by and through its officers, duly authorized, entered into a contract in writing with the plaintiff and O. C. Kendrick and Alonzo L. Foster, according to the legal tenor and effect thereof, which contract is substantially set forth in the paper annexed to the petition purporting to be a copy thereof, but which will more fully appear upon production of the original thereof upon the trial of this action, but the defendant denies that the legal tenor and effect of said contract are correctly set forth in the petition herein.

Third. Defendant says that it has no knowledge or information sufficient to form a belief whether or not the plaintiff and said Kendrick and Foster entered into a copartnership for the purpose mentioned in the petition, but it admits that said parties, by said contract, agreed to form a partnership, and subsequently held themselves out as copartners and for a time professed to act as agents of this defendant, under the contract aforesaid; and defendant has no knowledge or information sufficient to form a belief whether or not plaintiff rented his house in Toledo and removed his family to Cleveland, and whether or not such alleged firm commenced business as agents of the defendant, and opened an office and books, and began work of obtaining assurance in the company of the defendant in Ohio, and whether or not such alleged firm were making preparations to pursue their labors with great zeal and diligence in other States, and, therefore, this defendant denies the allegation of the petition in respect thereto.

25 Fourth. Defendant denies that the plaintiff or said alleged firm were, at any time, annoyed or impeded in their work by the officers of the defendant, in violation of said agreement, or that any change or wrong construction was put upon said agreement by the defendant, or that the defendant finally refused to grant said alleged firm the necessary authority to enter other States than Ohio, or undertook to take away from them any portion of their

territory, and to appoint agents of their own in the same, in violation of said agreement, or otherwise, except as hereinafter stated.

Fifth. Defendant admits that on or about July 18th, 1876, the defendant sent the said H. L. Dunn to Cleveland to procure a surrender of the before-mentioned contract, but denies that said Dunn had any authority to make any new contract which should be binding upon this defendant without its approval.

Sixth. Defendant admits that on or about the 21st day of July, 1876, an agreement was entered into between the parties by which said original agreement was to be cancelled, but defendant denies that the consideration therefor is correctly set forth in the petition, and the defendant alleges that said contract was surrendered by the plaintiff and said Kendrick and Foster, with the following indorsement thereon:

"In consideration of other agreements having been entered into between the said Provident Savings Life Assurance Society of New York, party of the first part, and Charles Cochran, Oscar C. Kendrick, and Alonzo L. Foster, parties of the second part, to the foregoing contract, and for other valuable considerations, the said contract is hereby revoked, annulled, and rendered inoperative.

"Cleveland, Ohio, July 22d, 1876.

"CHARLES COCHRAN.
"O. C. KENDRICK.
"A. L. FOSTER."

"Witness—
"H. L. DUNN."

26 And thereupon a new contract was made between the said defendant and said Kendrick and Foster, in which contract the said Cochran did not join, or wish to join.

Seventh. Defendant, further answering, denies that said Dunn was to go to New York and lay the matter of the secretaryship of the defendant before the president and directors of the defendant, or was to telegraph for the plaintiff within a short time to come to New York, to either accept said secretaryship or to agree upon and receive an amount in money, in consideration of his giving up said contract or otherwise, and defendant avers that said Dunn had no authority to make such agreement.

Eighth. Defendant denies that its officers have falsely, fraudulently, and maliciously or otherwise endeavored to cheat and defraud the defendant out of the value of the said contract, or have refused to settle with him in respect thereto, but defendant alleges that all claims of said Cochran, arising on said contract, have been fully satisfied, paid, and discharged.

Ninth. Defendant denies that in consequence of the alleged false representations and promises of said Dunn, acting for and in behalf of the defendant, and by reason of the premises or otherwise, he has suffered damage in the sum of twenty thousand dollars, or in any sum whatever.

Tenth. Defendant denies each and every allegation in the petition not hereinbefore expressly admitted.

Wherefore the defendant asks judgment against the plaintiff, for the dismissal of the petition, with costs of this action.

ANDREWS & KAISER,
Def't's Att'ys.

THE UNITED STATES OF AMERICA, } ss:
City and County of New York, }

27 Sheppard Homans, being duly sworn, says: That he is president of the defendant above named; that the statements made and allegations contained in the foregoing answer are, as he verily believes, true.

SHEPPARD HOMANS.

Subscribed and sworn to before me, by the said Sheppard Homans, this 20th day of February, 1877.

MELVIN BROWN,
Notary Public, N. Y. City and Co.

Afterwards, to wit, at the April term of this court, continued and held on the 4th day of September, A. D. 1877, this cause is continued until the next term of this court.

Afterwards, to wit, at the October term, A. D. 1877, of this court, to wit, on motion leave is granted said plaintiff to amend his petition instanter.

Afterwards, to wit, at the same term, continued and held on the 4th day of October, A. D. 1877, came the plaintiff, by his solicitor, and filed in this court an amendment to the petition in this cause, which is in the words and figures following, to wit:

Amendment to Petition.

THE UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, }

In the Circuit Court for said Northern District:

CHARLES COCHRAN, Pl'ff,
vs.
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Def't.

28 And now comes the plaintiff herein, and by leave of the court first had and obtained, makes the following amendment to his petition, which is to be used and read as an additional allegation before the clause beginning as follows: "Plaintiff further says that he has large experience," &c. The plaintiff says that for the purpose of performing said original contract it was necessary and proper to remove from the city of Toledo, where he resided when said contract was made, to the city of Cleveland, which removal cost the plaintiff $200; that he vacated his own house in Toledo and rented a house in the city of Cleveland at great expense and trouble, to wit, $500; that after said office was opened in the city of Cleveland he performed labor therein, and in connection

with said business for a period of five months and over, of the value of $1,500.

W. C. McFARLAND,
Pl'ff's Attorney.

THE UNITED STATES OF AMERICA, } *ss:*
The Northern District of Ohio, }

Charles Cochran, being sworn, says: That he is the plaintiff in the above-entitled case; that the statements contained in the foregoing amendment to his petition are, as he believes, true.

CHARLES COCHRAN.

Sworn to before me, and subscribed by the said Charles Cochran in my presence, this 3d day of October, A. D. 1877.

[SEAL.] G. E. POMEROY, JR.,
Notary Public, Lucas Co.

Afterwards, to wit, at the same term, continued and held on the 12th day of October, A. D. 1877, to wit:

On motion of said defendant's attorney, it is ordered that this cause stand continued until the next term of this court, and that leave be granted said defendant to answer herein in thirty days.

Afterwards, to wit, at the January term of this court, continued and held on the 28th day of January, 1878, to wit:

29 On motion, and by consent of parties, it is ordered that this cause stand continued until the next term of this court, at plaintiff's costs of term, which costs, taxed at $ ——, said plaintiff shall pay within five days, or in default thereof that execution issue against him therefor.

Afterwards, to wit, at the April term of this court, continued and held on the 16th day of April, A. D. 1878, to wit:

In this cause it is ordered that leave be granted to the defendant to file its amended answer herein instanter.

Afterwards, to wit, on the 17th day of April, A. D. 1878, came the defendant, by its solicitors, and filed in the clerks office of this court its amended answer in this cause, which is in the words and figures following, to wit:

Amended Answer.

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio, }

In Circuit Court for said District.

CHARLES COCHRAN, Plaintiff,
vs.
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Defendant.

The defendant, The Provident Savings Life Assurance Society of New York, answers the petition and amended petition of the plain-

Wherefore the defendant asks judgment against the plaintiff, for the dismissal of the petition, with costs of this action.

ANDREWS & KAISER,
Def't's Att'ys.

THE UNITED STATES OF AMERICA, }
City and County of New York, } *ss:*

27 Sheppard Homans, being duly sworn, says: That he is president of the defendant above named; that the statements made and allegations contained in the foregoing answer are, as he verily believes, true.

SHEPPARD HOMANS.

Subscribed and sworn to before me, by the said Sheppard Homans, this 20th day of February, 1877.

MELVIN BROWN,
Notary Public, N. Y. City and Co.

Afterwards, to wit, at the April term of this court, continued and held on the 4th day of September, A. D. 1877, this cause is continued until the next term of this court.

Afterwards, to wit, at the October term, A. D. 1877, of this court, to wit, on motion leave is granted said plaintiff to amend his petition instanter.

Afterwards, to wit, at the same term, continued and held on the 4th day of October, A. D. 1877, came the plaintiff, by his solicitor, and filed in this court an amendment to the petition in this cause, which is in the words and figures following, to wit:

Amendment to Petition.

THE UNITED STATES OF AMERICA, }
Northern District of Ohio, } *ss:*

In the Circuit Court for said Northern District:

CHARLES COCHRAN, Pl'ff,
vs.
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Def't.

28 And now comes the plaintiff herein, and by leave of the court first had and obtained, makes the following amendment to his petition, which is to be used and read as an additional allegation before the clause beginning as follows: "Plaintiff further says that he has large experience," &c. The plaintiff says that for the purpose of performing said original contract it was necessary and proper to remove from the city of Toledo, where he resided when said contract was made, to the city of Cleveland, which removal cost the plaintiff $200; that he vacated his own house in Toledo and rented a house in the city of Cleveland at great expense and trouble, to wit, $500; that after said office was opened in the city of Cleveland he performed labor therein, and in connection

with said business for a period of five months and over, of the value of $1,500.

W. C. McFARLAND,
Pl'ff's Attorney.

THE UNITED STATES OF AMERICA, } *ss:*
The Northern District of Ohio, }

Charles Cochran, being sworn, says: That he is the plaintiff in the above-entitled case; that the statements contained in the foregoing amendment to his petition are, as he believes, true.

CHARLES COCHRAN.

Sworn to before me, and subscribed by the said Charles Cochran in my presence, this 3d day of October, A. D. 1877.

[SEAL.] G. E. POMEROY, JR.,
Notary Public, Lucas Co.

Afterwards, to wit, at the same term, continued and held on the 12th day of October, A. D. 1877, to wit:

On motion of said defendant's attorney, it is ordered that this cause stand continued until the next term of this court, and that leave be granted said defendant to answer herein in thirty days.

Afterwards, to wit, at the January term of this court, continued and held on the 28th day of January, 1878, to wit:

29 On motion, and by consent of parties, it is ordered that this cause stand continued until the next term of this court, at plaintiff's costs of term, which costs, taxed at $ ——, said plaintiff shall pay within five days, or in default thereof that execution issue against him therefor.

Afterwards, to wit, at the April term of this court, continued and held on the 16th day of April, A. D. 1878, to wit:

In this cause it is ordered that leave be granted to the defendant to file its amended answer herein instanter.

Afterwards, to wit, on the 17th day of April, A. D. 1878, came the defendant, by its solicitors, and filed in the clerks office of this court its amended answer in this cause, which is in the words and figures following, to wit:

Amended Answer.

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio, }

In Circuit Court for said District.

CHARLES COCHRAN, Plaintiff.
vs.
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Defendant.

The defendant, The Provident Savings Life Assurance Society of New York, answers the petition and amended petition of the plain-

tiff, Charles Cochran, and says as follows: The defendant admits that the plaintiff is a citizen and a resident of the State of Ohio, and of the northern district thereof, and that the defendant is a corporation as alleged in the petition. Defendant admits that on or about the 12th day of February, 1876, the defendant, by and through
30 its officers duly authorized, entered into a contract in writing
with the plaintiff and O. C. Kendrick and Alonzo L. Foster, according to the legal tenor and effect thereof, which contract is substantially set forth in the paper annexed to the petition purporting to be a copy thereof, but which will more fully appear upon a production of the original thereof upon the trial of this action. But the defendant denies that the legal tenor and effect of said contract are correctly set forth in the petition herein; defendant admits that said parties, Cochran, Kendrick and Foster, held themselves out as copartners, and for a short time professed to act as agents of this defendant, and opened an office and books, and began the work of obtaining assurance in the company of the defendant, in Ohio; but defendant has no knowledge or information or means of knowing whether or not plaintiff rented his house in Toledo and removed with his family to Cleveland, and therefore denies the allegation of the petition in respect thereto. Defendant denies that plaintiff or said firm were at any time annoyed or impeded in their work by the officers of defendant, in violation of said agreement, or that any change or wrong construction was put upon said agreement by the defendant, or that defenant finally refused to grant said firm the necessary authority to enter other States than Ohio, or undertook to take away from them any portion of their territory, and to appoint agents of their own on the same, in violation of said agreement, or to do so at all, except as hereinafter stated. The defendant admits that on ar about the 18th day of June, 1876, the said Dunn, by request of plaintiff made to him three days before, and with the subsequent assent of the president of this defendant, came from Pittsburgh to Cleveland to confer with plaintiffs, Kendrick and Foster, in regard to the difficulties existing between them and this defendant, and to take such necessary and expedient steps for defendant's interest in the premises as he might properly take; but it says that neither said Dunn nor said president had any authority to
31 promise to plaintiff the secretaryship of defendant, or the
payment by defendant of any money in lieu thereof; and it denies that said Dunn, acting under any instructions of this defendant, made any such agreement with plaintiffs, Kendrick and Foster, or with plaintiff at all; and defendant denies that it was ever agreed upon between it and any person or persons whomsoever that plaintiff should either have the secretaryship of defendant, or in lieu thereof any sum of money whatever; defendant denies that said Dunn ever made such agreement at all. Defendant says that under the custom and usage of the life assurance business in general, and of this defendant in particular, the appointment to its secretaryship must be made by a vote of the board of directors, and that the payment of money in lieu thereof could not be made at the time when said original contract was cancelled, and never could be

made except upon such vote to that effect, and that plaintiff at said time well knew said custom and usage. And defendant says that no such vote was ever had, and no such agreement as in the petition alleged in respect to giving plaintiff the secretaryship or paying him money was ever submitted to said board of directors.

Defendant further says, that under its charter and by-laws the appointment of its secretary could only be made in the manner aforesaid.

Defendant says that neither said Dunn nor said president ever had any general or specific authority to make said agreement with plaintiff, or to make any new contract whatever in the premises, except as subject to defendant's ratification, and did not do so, nor attempt to do so. Defendant admits that on or about the 21st of July, A. D. 1876, the said Dunn made an agreement with said Cochran, Kendrick, and Foster, by which the original contract between defendant and them was to be cancelled; but defendant denies that the consideration therefor is correctly set forth in the petition; and the defendant alleges that said contract was surrendered by the plaintiff and said Kendrick and Foster, with the following endorsement thereon:

32 "In consideration of other agreements having been entered into between the said Provident Savings Life Assurance Society of New York, parties of the first part, and Charles Cochran, Oscar C. Kendrick, and Alonzo L. Foster, parties of the second part, to the foregoing contract, and for other valuable considerations, the said contract is hereby revoked, annulled and rendered inoperative.

"CHARLES COCHRAN.
"O. C. KENDRICK.
"A. L. FOSTER.

"Cleveland, Ohio, July 22, 1876.
"H. L. DUNN."

And thereupon a new contract was made between the defendant and said Kendrick and Foster, in which contract the said Cochran did not join or wish to join. Defendant, further answering, denies that it made or authorized any agreement under which said Dunn was to go to New York and lay the matter of the secretaryship of the defendant before the president and directors of the defendant, or was to telegraph for the plaintiff within a short time to come to New York, to either accept such secretaryship, or to agree upon and receive an amount of money in consideration of his giving up said contract or otherwise, and defendant avers that said Dunn had no authority to make such agreement. Defendant denies that its officers have falsely, fraudulently, and maliciously or otherwise endeavored to cheat and defraud the defendant out of the value of the said contract, or have refused to settle with him in respect thereto, but defendant alleges that all claims of said Cochran arising on said contract have been fully satisfied, paid and discharged. Defendant denies that in consequence of the alleged false representations and promises of said Dunn, acting for and in behalf of the defendant, and by reason of the premises or otherwise, the plaintiff has suffered damage in the sum of twenty thousand dollars, or in any sum whatever. Defendant denies each and every allegation of the petition not hereinbefore expressly admitted or denied. Wherefore defendant asks that it may be dismissed hence with its costs. 33

STANLEY, BROWN & CLARKE,
AND ANDREWS & KAISER, *Def't's Att'ys.*

UNITED STATES OF AMERICA, }
Northern District of Ohio, Cayuga County, } *ss:*

Before me personally came Sheppard Homans, who, being first duly sworn, says: That he is the president of the defendant, the said Providence Savings Life Assurance Society of New York, and that the facts stated and allegations contained in its foregoing answer are true, as he verily believes.

SHEPPARD HOMANS.

Sworn to by said Homans before me, and by him subscribed in my presence, this 17th day of April, A. D. 1878.

A. J. RICKS,
Com'r U. S., N. D. O.

Afterwards, to wit, on the 29th day of April, A. D. 1878, came the plaintiff, by his attorney, and duly filed in the clerk's office of this court a reply in this cause, which is in the words and figures following, to wit:

Reply.

THE UNITED STATES OF AMERICA, }
The Northern District of Ohio, } *ss:*

In the United States Circuit Court for said District.

CHARLES COCHRAN, Plaintiff,
against
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
Defendant.

34 And now comes the plaintiff, Charles Cochran, and for a reply to the amended answer of the defendant filed herein, says: That he denies each and every allegation in said answer contained which does not admit the facts and statements contained in the plaintiff's petition.

CHARLES COCHRAN,
By W. C. McFARLAND,
His Attorney.

THE UNITED STATES OF AMERICA, }
Northern District of Ohio, } *ss:*

Charles Cochran, the plaintiff, being sworn, says: That the statements and allegations contained in the foregoing reply are, as he believes, true.

CHARLES COCHRAN.

Sworn to before me, and subscribed by the said Charles Cochran in my presence, this 17th day of April, 1878.

[SEAL.] GEO. A. GALLOWAY,
Notary Public.

Afterwards, to wit, at the April term of this court, continued and held on the 10th day of May, A. D. 1878, to wit:

This day came the parties, by their respective attorneys, and thereupon a jury come, to wit, James Jackson, Robert Baker, James Crawford, Theodore Miller, Peter Munson, C. C. Wick, John A. Rettigs, Henry Winger, James Brockenshier, Richard A. Kirkwood, Jacob S. Erbmann, and James R. Currier, who, being accepted, were empanelled and sworn and affirmed to well and truly try the issues between the parties at bar. Testimony on behalf of the plaintiff was adduced in part, and hour of adjournment having arrived, this cause was continued until to-morrow morning at 9 o'clock.

Afterwards, to wit, at the April term of this court, continued and held on the 11th day of May, A. D. 1878, to wit:

This day again came the parties, by their respective attorneys,
and also came the jury here before empanelled and sworn in
35 this cause, and the trial of this cause proceeded. Further
testimony was adduced on part of the plaintiff, and the hour
of adjournment having arrived, the further trial of this cause was
continued until eleven o'clock Monday morning, May 13th, 1878.

Afterwards, to wit, at the April term of this court, continued and held on the 13th day of May, A. D. 1878, to wit:

This day again came the parties by their respective attorneys, and also came the jury heretofore empanelled and sworn in this cause, and the trial of this cause proceeded. Further testimony was adduced on part of the plaintiff, and the hour of adjournment having arrived, the further trial of this cause was continued until 9 o'clock to-morrow morning.

Afterwards, to wit, at the April term of this court, continued and held on the 14th day of May, A. D. 1878, to wit:

This day again came the parties by their respective attorneys, and also came the jury heretofore empanelled and sworn, and affirmed herein, and the trial proceeded. Further testimony was adduced on part of the parties, when the hour of adjournment having arrived the further trial of this cause was continued until 9 o'clock to-morrow morning.

Afterwards, to wit, at the April term of this court, continued and held on the 15th day of May, A. D. 1878, to wit:

This day again came the parties by their respective attorneys, and also came the jury heretofore empanelled and sworn in this cause, and the trial proceeded on behalf of the parties, when the hour of adjournment having arrived, the further trial was continued until nine o'clock to-morrow morning.

Afterwards, to wit, at the April term of this court, continued and held on the 16th day of May, A. D. 1878, to wit:

This day again came the parties by their respective attorneys, and also came the jury heretofore empanelled and sworn and affirmed in this cause, and the trial proceeded. Further testimony
36 was adduced on behalf of the parties, when the hour of adjournment having arrived, the further trial of this cause was continued until nine o'clock to-morrow morning.

Afterwards, to wit, at the April term of this court, continued and held on the 17th day of May, A. D. 1878, to wit:

This day again came the parties by their respective attorneys, and also came the jury heretofore empanelled and sworn in this cause, and the trial proceeded. The remaining testimony was adduced on behalf of the parties, and the cause was argued on behalf of the plaintiff, and the hour of adjournment having arrived, the further trial of this cause was continued until nine o'clock to-morrow morning.

Afterwards, to wit, at the April term of this court, continued and held on the 18th day of May, A. D. 1878, to wit:

This day again came the parties by their respective attorneys, and also came the jury heretofore empanelled and sworn in this cause. Arguments were made on behalf of the parties, when the hour of adjournment having arrived, the further trial of this cause was continued until Monday next, at eleven o'clock a. m.

Afterwards, to wit, at the April term of this court, continued and held on the 20th day of May, A. D. 1878, to wit:

This day again came the parties by their respective attorneys, and also came the jury heretofore empanelled and sworn in the cause, and the argument on behalf of the defendant was continued until the hour of adjournment, when the further trial of this cause was continued until to-morrow morning at nine o'clock.

Afterwards, to wit, at the April term of this court, continued and held on the 21st day of May, A. D. 1878, to wit:

This day again came the parties by their respective attorneys, and also came the jury, heretofore empanelled and sworn in the cause, and the argument on behalf of the defendant was concluded at the hour of adjournment, when the further trial of the cause was conuntil nine o'clock to-morrow morning.

37 Afterwards, to wit, at the April term of this court, continued and held on the 22d day of May, A. D. 1878, to wit:

This day again came the parties by their respective attorneys, and also came the jury heretofore empanelled and sworn in this cause, and the trial proceeded. The concluding argument of counsel for plaintiff was heard, whereupon the jury received the charge of the court, and retired to their room for deliberation, in charge of the marshal, and the hour of adjournment having arrived, and the jury not having agreed upon their verdict, the further proceedings in this cause was continued until nine o'clock to-morrow morning.

Afterwards, to wit, at the April term of this court, continued and held on the 23d day of May, A. D. 1878, to wit:

This day again came the parties by their respective attorneys, and also came the jury heretofore empanelled and sworn in this cause, and said jury, for verdict, say: We, the jury in this case, being duly empanelled and sworn, do find for the plaintiff, and assess his damages at three thousand one hundred dollars ($3,100).

JAMES CRAWFORD, *Foreman.*

Whereupon comes the defendant, by its attorneys, and gives notice of a motion for a new trial in this cause.

Afterwards, to wit, on the 25th day of May, A. D. 1878, there was duly filed in the clerk's office of this court a motion in this cause, which is in the words and figures following, to wit:

38 *Motion.*

In the United States Circuit Court, Northern District of Ohio.

Charles Cochran, Plaintiff,
against
The Provident Savings Life Assurance Society of New York, Defendant.

And now comes the defendant, The Provident Savings Life Assurance Society of New York, by its attorneys, Andrews & Kaiser and S. J. Andrews, and moves the court here for a new trial in this action, for the following reasons:

1st. That the damages given by the jury are excessive.

2d. That said damages so given are excessive, appearing to have been given under the influence of passion or prejudice.

3d. That the verdict given in this case is not sustained by sufficient evidence, and is contrary to law.

4th. That the court erred in permitting the plaintiff's witnesses to be asked what, in their opinion or judgment, the contract of February 12th, 1876, was worth on the 22d day of July, 1876, and in permitting them, in reply, to give their opinion as to value of said contract.

39 5th. That the court erred in allowing the plaintiff's witnesses to give their opinions as to the worth or value of said contract.

6th. That the court erred in allowing the value of said contract to be inquired into as an issue in this case.

7th. That the court erred in permitting the jury to consider profits that were prospective, contingent, and speculative, in ascertaining the value of said contract.

8th. That the court erred in allowing evidence to be received of the profits made by other insurance companies at other agencies and in other years prior to February 12th, 1876.

9th. That the court erred in charging the jury that the letter of July 1st, from Homans, as president of the defendant, to Dunn, gave said Dunn authority to cancel the contract of February 12th, 1876, and to bind the defendant by the verbal contract of July 22d, 1876, with the plaintiff, as set forth in the petition, or that said Dunn had power under said letter to make any contract, or such promises as might be necessary, or such agreements as might be determined upon, in reference to, or in order to procure the cancellation of, said contract of February 12th, 1876.

10th. That the court erred in charging the law with reference to the revocation of said letter of July 1st, 1876, and knowledge thereof on the part of plaintiff.

11th. That error of law occurred at the trial of said cause, which was duly excepted to by defendant.

ANDREWS & KAISER, AND
S. J. ANDREWS,
Defendant's Attorneys.

Afterwards, to wit, at the April term, A. D. 1878, of said court this cause was continued.

40 Afterwards, to wit, now at this October term, A. D. 1878, of said court, continued and held on the 10th day of October, 1878, to wit:

This cause came on for hearing upon the defendant's motion for a new trial in this cause, which motion was argued by counsel, and thereupon, upon consideration thereof, it was ordered that said motion be overruled. It is therefore considered by the court that said plaintiff recover against said defendant said sum of three thousand and one hundred dollars, his damages as aforesaid, together with the further sum of ninety-three dollars, being the interest on that amount to the first day of the present term of this court, making in all the sum of $3,193, together with his costs herein expended, taxed at $112.45.

UNITED STATES OF AMERICA, *Northern District of Ohio:*

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify that I have compared the above and foregoing with the original papers on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original papers, and of all the proceedings had in said court in the cause wherein Charles Cochran is the plaintiff and the Provident Savings Life Assurance Society of New York is defendant, as the same appears from the files and records of said court now remaining in my custody. And I do further certify that I am the clerk or officer in whose custody said original papers are by law required to be kept.

In testimony whereof, I have hereunto set my hand and official seal, at my office, in Cleveland, in said district, this 18th day of November, A. D. 1878.

[SEAL.] AUGUST. J. RICKS, *Clerk.*

41 *Statement.*

United States Circuit Court, Northern District of Ohio.

CHARLES COCHRAN
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY. } No. 3235.

Original costs—damages		$3,193 00
Clerk's fees	$14 50	
Marshal's fees	11 25	
Docket "	20 00	
Masters' "		
Notary	40	
Commissioner's fees	25	
Witness' fees	36 00	
Fees on depositions		
Interest from October 1st, 1878		
Increase costs		
Transcript of the record	8 75	121 15
Total		$3,314 15

Whereupon counsel for defendant said: "I object until there is some evidence of the authenticity of the certification. It is inadmissible in evidence until it is shown by whom it is certified. The statute provides for the admission in evidence of records from the district and circuit courts of the United States when certified by the officer having the custody of those records, but that does not dispense with proof of the fact of who is the proper officer by other proof than his own certificate. That should be shown by some other proof."

42 The COURT: "I think there is a compliance."

COUNSEL FOR DEFENDANT: If he is the officer, it is a compliance.

The COURT: "We must assume it is, if it is certified, we can hardly assume it is a forgery.

(Defendant's counsel excepted to its admission.)

The plaintiff's counsel then offered in evidence an assignment of judgment to the plaintiff in this action, and the acknowledgement and proof of the execution of the same as follows, to wit:

For a valuable consideration received, to my full satisfaction, of Daniel W. Ford, of Troy, New York, I have sold, and by these present do hereby sell, assign, and transfer to the said Daniel W. Ford, all my right, title, and interest in and to a certain judgment and cost recovered by me against the Provident Savings Life Assurance Society of New York, in the United States circuit court for the northern district of Ohio, a statement of which judgment and costs is hereto annexed.

To have and to hold the said judgment unto the said Daniel W. Ford, his heirs and assigns, forever.

In witness whereof, I have hereunto set my hand, this 30th day of November, 1878, at Toledo, Ohio.

CHARLES COCHRAN.

THE STATE OF OHIO, } *ss:*
Henry County, }

On this 29th day of January, 1879, before me, a notary public within and for the county of Henry and State of Ohio, personally appeared Charles Cochran, by me known to be the same person described in and who executed the foregoing instrument,
43 and acknowledged the execution thereof for the uses and purposes therein named.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Napoleon, Ohio, this 29th day of January, 1879.

[L. S.] CHAS. C. SELFRIDGE,
Notary Public Within and for said
Henry County and State of Ohio.

THE STATE OF OHIO, } *ss:*
Henry County, }

I, O. E. Barnes, clerk of the said county, and also clerk of the court of common pleas within and for said county and State of Ohio, being a court of record, held therein, do hereby certify that said Charles C. Selfridge, whose name is subscribed to the certificate of proof or acknowledgement of the annexed instrument, was, at the time of taking such proof or acknowledgement, a notary public in and for the county of Henry and State of Ohio, and dwelling in said county, and duly authorized to take the same; that I am well acquainted with the handwriting of the said notary, and verily believe that his signature to the said certificate of proof or acknowledgement is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, this 29th day of January, A. D. 1879.

[SEAL.] O. E. BARNES, *Clerk.*

To which the defendant's counsel objected that there is no proper proof of the execution of the instrument, and further that it is not an instrument required to be acknowledged, and therefore not within the statute.

44 Objection overruled; defendant's counsel duly excepted; the judgment roll was then read in evidence, and the assignment of the same, with the acknowledgement and proof of its execution, was also then read in evidence.

Plaintiff thereupon rested. The defendant then, to maintain the issues on his part, called as a witness Daniel W. Ford, who was duly sworn for defendant, and testified as follows:

Q. Are you plaintiff in this action?
A. Yes, sir.
Q. Do you own this judgment?
A. Yes, sir.

Q. What did you give for it?

(Objected to, as immaterial and incompetent.)

The COURT: I don't see how it is material.

(Defendant excepted.)

Q. Was it given to you?

(Same objection.)

The COURT: I think there is a legal transfer; the transfer is ample.

(Defendant excepted.)

Plaintiff's counsel then moved for judgment, and the court said: "Gentlemen of the jury, the plaintiff is entitled, upon the evidence, to your verdict of $3,394.15," and directed a verdict to be entered accordingly; to which direction counsel for the defendant duly excepted.

45 Supreme Court, Rensselear County.

DANIEL W. FORD
against
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

Take notice that the defendant above named hereby appeals to the general term of this court from the judgment entered in the above action in the office of the clerk of Rensselaer county, on the 18th day of February, 1879, in favor of the above-named plaintiff and against the above-named defendant, for the sum of thirty-five hundred and seventy-three dollars and forty-four cents, and from each and every part thereof, and also from the order of Mr. Justice Ingalls, directing this cause to proceed in this court, after the filing of the petition and the approval of the bond herein, on February 17, 1879, for the removal of said cause into the circuit court of the United States for the northern district of New York.

Dated New York, February 25, 1879.

STANLEY, BROWN & CLARKE,
Attorneys for Defendant, 195 Broadway, N. Y. City.

To county clerk of Rensselaer county, and Smith, Fursman & Cowen, Esqs., attorneys for plaintiff.

46 STATE OF NEW YORK, CITY OF TROY,
COUNTY OF RENSSELAER, CLERK'S OFFICE.

I hereby certify that I have compared the annexed copy, case on appeal, with the original thereof, filed in this office on the 7th day of May, 1879, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 28th day of August, 1879.

[SEAL.] JAMES KEENAN, *Clerk.*

At a general term of the supreme court of the State of New York, held at the City Hall, in the city of Albany, on the 26th day of November, 1879.

Present: Hon. Wm. L. Learned, presiding justice; Augustus Bockes, Douglas Boardman, associate justices.

DANIEL W. FORD, Respondent,
ag'st
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Appellant.

The appeal from the judgment entered in above-entitled action in favor of plaintiff and against defendant for $3,573.44 damages and costs, coming on to be heard at a general term of this court,
47 and after hearing Esek Cowen for respondent and S. G. Clarke, Esq., for appellant:

It is ordered that said judgment be, and the same is hereby, in all things affirmed, with costs.

[L. S.] JOHN LARKIN, *Clerk.*

Judgment, Dec. 10, 1879.

Supreme Court.

DANIEL W. FORD
ag'st
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

The above-named defendant having appealed to the general term of this court from the judgment entered herein in the Rensselear county clerk's office, on the 18th day of February, 1879, in favor of plaintiff against defendant for the sum of $3,573.44 damages and costs, and said appeal having been heard and considered by said general term, and the order of said general term having been duly filed and entered, whereby it appears that said judgment appealed from is, in all respects affirmed, with costs.

Now, on motion of Smith, Fursman & Cowen, plaintiff's attorneys, it is adjudged that said judgment appealed from be, and the same hereby is, in all respects affirmed. And it is further adjudged that plaintiff recover of said defendant the sum of eighty-eight*y* dollars and eighty cents, costs of said appeal, and have execution therefor.

JAMES KEENAN, *Clerk.*

Filed Dec. 10, 1879, at 10 h. a. m.

48 Supreme Court, Rensselaer County.

DANIEL W. FORD
against
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

Take notice that defendant appeals to the court of appeals from the judgment of the general term of the supreme court in the above action, entered in the office of the clerk of Rensselaer county, on the 10th day of December, 1879, in favor of the above-named plaintiff and against the above-named defendant for the sum of eighty-eight 80-100 dollars, and affirming the judgment theretofore entered on the 18th day of February, 1879, in favor of the said plaintiff against the said defendant for the sum of $3,573.44 damages and costs.

Dated New York, December 11th, 1879.

STANLEY, BROWN & CLARKE,
Att'ys for Defendant and Appellant.

To SMITH, FURSMAN & COWEN, Esqs.,
Att'ys for Plaintiff.

To the county clerk of Rensselaer.

STATE OF NEW YORK, CITY OF TROY,
COUNTY OF RENSSELAER, CLERK'S OFFICE.

I hereby certify that I have compared the annexed copy case, judgment, and notice of appeal with the originals thereof, filed in this office, and that the same are correct transcripts therefrom and of the whole of said originals.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 27th day of Dec., 1879.

[L. S.] JAMES KEENAN, *Clerk.*

49 Supreme Court, Rensselaer County.

DANIEL W. FORD, Respondent,
against
THE PROVIDENT SAVINGS LIFE ASSURANCE OF NEW YORK, Appellant.

CITY AND COUNTY OF NEW YORK, *ss:*

Melvin Brown, being duly sworn, says: That he is one of the attorneys of the appellant in the above action; that as he is informed and verily believes, no opinion was delivered at general term upon affirmance of the judgment in the above action, and therefore the reasons of the court below for its judgment cannot be procured.

MELVIN BROWN.

Sworn to before me, this 13th day of January, 1880.

S. F. RANDALL,
Notary Public, Kings Co.

50 *Court of Appeals.*

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 18th day of January, in the year of our Lord one thousand eight hundred and eighty, before the judges of said court.

Witness the Hon. Charles J. Folger, chief judge, presiding.

E. O. PERRIN, *Clerk,*

Remittitur January 20, 1881.

DANIEL W. FORD, Resp'd't,
ag'st
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
App'l't.

Be it remembered that on the thirtieth day of December, in the year of our Lord one thousand eight hundred and seventy-nine, The Provident Savings Life Assurance Society of New York, the appellant in this action, came here into the court of appeals, by Stanley, Brown and Clarke, its attorneys, and filed in the said court a 51 notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and Daniel W. Ford, the respondent in said action, afterwards appeared in said court of appeals, by Smith, Fursman and Cowen, his attorneys, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, this cause having been submitted by counsel for the appellants, and argued by Mr. Esek Cowen, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law. Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

52 And hereupon, as well as the notice of appeal and return thereto aforesaid, as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *Jan'y* 20, 1881.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] E. O. PERRIN, *Clerk.*

Filed Jan'y 25, 1881.

53 At a special term of the supreme court, held at the chambers of Hon. C. R. Ingalls, in the city of Troy, N. Y., on the 21st day of January, 1881.

Present: Hon. C. R. Ingalls, justice.

DANIEL W. FORD
ag'st
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

On reading and filing the annexed remittitur from the court of appeals, and on motion of Smith, Fursman & Cowen, plaintiff's attorneys, it is ordered that the said judgment of the court of appeals be, and the same is hereby, made the judgment of this the supreme court.

C. R. INGALLS,
Jus. Sup. Court.

Filed Jan'y 25, 1881.

54 *Judgment.—Jan.* 25, 1881.

Supreme Court.

DANIEL W. FORD
ag'st
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

The above-named defendant having appealed to the court of appeals from the judgment of the general term of this supreme court, entered in the Rensselaer county clerk's office December 10, 1879, in favor of above-named plaintiff, for the sum of $88.80 costs, and affirming the judgment theretofore entered on the 18th day of February, 1879, in favor of said plaintiff and against the above-named defendant for the sum of $3,573.44, damages and costs, and said court of appeals having in all things affirmed the judgment of this court so appealed from:

Now, on reading and filing the remittitur from the said court of appeals, and the order of this supreme court making the judgment of said court of appeals the judgment of said supreme court, and on motion of Smith, Fursman & Cowen, plaintiff's attorneys, it is adjudged that the said judgment appealed from be, and the same is hereby, in all respects affirmed.

55 And it is further adjudged that said plaintiff recover of the defendant herein the sum of one hundred and thirty-five dollars and fourteen cents for his costs of said appeal to the court of appeals, as this day taxed, and have execution therefor.

JAMES KEENAN, *Clerk.*

Filed Jan'y 25, 1881, at 4 h. p. m.

56 UNITED STATES OF AMERICA, *ss:*

[L. S.] The President of the United States to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being possessed of the record and proceedings upon a remittitur from the court of appeals of the State of New

York, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Daniel W. Ford, plaintiff, and The Provident Savings Life Assurance Society of New York, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such
57 their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should de done.

58 Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-eighth day of January, in the year of our Lord one thousand eight hundred and eighty-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
M. R. WAITE,
Chief Justice Sup. C't U. S.

Filed Jan'y 31, 1881.

The United States to Daniel W. Ford, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, Rensselaer county, wherein the Provident Savings Life
59 Assurance Society of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and eighty-one.

M. R. WAITE,
Chief Justice Sup. C't U. S.

STATE OF NEW YORK,
County of Rensselaer, } *ss:*

On this 31st day of January, in the year of our Lord one thousand eight hundred and eighty-one, personally appeared Lansing Van Schoonhoven before me, the subscriber, notary public in and for said county and residing therein, and makes oath that he delivered a true copy of the within citation to Daniel W. Ford, 60 known to him to be the same person within described, at the city of Troy, in said county, & left said copy with him, and at the same time shewed to him the within original citation.

LANSING VAN SCHOONHOVEN.

Sworn to and subscribed the thirty-first day of January, A. D. 1881.

GEO. F. NICHOLS,
Notary Public, Rens. Co., N. Y.

Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-one.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
Plaintiff in Error,
against
DANIEL W. FORD, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in said term, before the justices of the Supreme Court of the United States, 61 at the Capitol, in the city of Washington, comes the said The Provident Savings Life Assurance Society of New York, by Stanley, Brown & Clarke, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid there is error in the several rulings of the court to which exception has been taken, and that by the record aforesaid it appears that judgment aforesaid, in form aforesaid given, was given for the said defendant against the said plaintiff, whereas by law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendant in error; and the said plaintiff prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid, as the same appear more fully therein, may be reversed, annulled, and altogether held as nothing, and that it, the plaintiff, may be restored to those things which it has lost by reason of said judgment.

STANLEY, BROWN & CLARKE,
Att'ys for Pl'ff in Error.

Filed Sept. 6, 1881.

62 Know all men by these presents, that we, The Provident Savings Life Assurance Society of New York and Joseph H. Parsons, of No. 613 Fifth avenue, in the city of New York, and Addison Brown, of No. 233 East 48 street, in the city of New York, are held and firmly bound unto Daniel W. Ford in the just and full sum of eight thousand dollars, lawful money of the United States, to be paid to the said Daniel W. Ford, his executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves and our heirs, successors, administrators, and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this 26th day of January, 1881.

Whereas lately in the supreme court of the State of New York in and for the county of Rensselaer, in a suit depending in said court between Daniel W. Ford, plaintiff, and The Provident Savings Life Assurance Society of New York, defendant, judgment was rendered on January 25, 1881, upon the remittitur from the court of appeals against the said defendant, affirming the previous judgment 63 of said supreme court for $3,573.44, with $88.80 and $135.14 costs of appeals; and whereas the said defendant is about to prosecute a writ of error to reverse the judgment in the aforesaid suit, and a citation therefor being directed to the said Daniel W. Ford, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said The Provident Savings Life Assurance Society of New York shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
By WM. E. STEVENS, *Secretary*. [L. S.]
JOSEPH H. PARSONS. [L. S.]
ADDISON BROWN. [L. S.]

Sealed and delivered in presence of—
MELVIN BROWN.

CITY AND COUNTY OF NEW YORK, *ss:*

Joseph H. Parsons and Addison Brown, being severally 64 duly sworn, says, each for himself: That he is a resident of the State of New York, and is worth the sum of ten thousand dollars over and above his debts and liabilities, and exclusive of property by law exempt from execution.

JOSEPH H. PARSONS.
ADDISON BROWN.

Sworn to before me, this 26th day of January, 1881.

[L. S.] MELVIN BROWN,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

STATE OF NEW YORK,
City & County of New York, } *ss:*

On this 26th day of January, 1881, before me personally appeared Joseph H. Parsons and Addison Brown, to me personally known to be the persons described in and who executed the foregoing bond, and severally acknowledged to me that they executed the same; and on this 26th day of January, 1881, before me personally appeared William E. Stevens, to me known, who, being by me duly sworn, says: That he resides at No. 239 Adelphi street, in the city of Brooklyn, and that he is the secretary of The Provident Savings Life
65 Assurance Society of New York, the corporation described in and which executed the foregoing instrument; that the seal affixed to the foregoing instrument is the corporate seal of the said corporation, and was affixed thereto by its authority, and that he signed his name thereto by like authority.

[L. S.] MELVIN BROWN,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

[Endorsed:] Approved as sufficient for the purpose of a supersedeas. Dated Jan'y 28, 1881. M. R. Waite, Chief Justice Sup. C't, U. S. Filed Jan'y 31, 1881.

66 UNITED STATES OF AMERICA.

STATE OF NEW YORK,
County of Rensselaer, } *ss:*

I, James Keenan, clerk of the supreme court of the said county of Rensselaer, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing is a true and complete transcript of the record and of all the proceedings in the cause of Daniel W. Ford against The Provident Savings Life Assurance Society of New York, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of Troy, in New York, this 12th day of September, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] JAMES KEENAN, *Clerk.*

67 Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-one.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
Plaintiffs in Error,
against
DANIEL W. FORD, Defendant in Error.

Afterwards, to wit, on the second Monday of October in said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Provident Savings Life Assurance Society of New York, by Stanley,

Brown & Clarke, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid there is error in the several rulings of the
68 Court to which exception has been taken, and that by the record aforesaid it appears that judgment aforesaid in form aforesaid given was given for the said defendant against the said plaintiff, whereas by law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendant in error. And the said plaintiff prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, as the same appear more fully therein, may be reversed, annulled, and altogether held as nothing, and that it, the plaintiff, may be restored to those things which it has lost by reason of said judgment.

STANLEY, BROWN & CLARKE,
Att'ys for Pl'ff in Error.

69 [Endorsed:] U. S. Supreme Court. No. 1059. The Provident Savings Life Assurance Society of New York, pl'ffs in error, *vs.* Daniel W. Ford, def't in error. Assignment of errors. Stanley, Brown & Clarke, att'ys for pl'ff in error, 158 B'way, N. Y. Filed Sept. 6, 1881.

Endorsed on cover: New York supreme court. No. 105. The Provident Savings Life Assurance Society of New York, plaintiff in error, *vs.* Daniel W. Ford. Filed October 15, 1881.

114-635

Office Supreme Court U. S.
FILED.
NOV 19 1884
JAMES H. McKENNEY,
Clerk

UNITED STATES SUPREME COURT,

No. 105.

THE PROVIDENT SAVINGS LIFE ASSURANCE
SOCIETY OF NEW YORK,
Plaintiff in Error,
against
DANIEL FORD,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

Stephen G. Clarke
Edwin B. Smith } of Counsel

C. G. Burgoyne's "Quick" Print, 146-150 Centre St., N. Y.

Supreme Court of the United States.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
Plaintiff in Error,

AGAINST

DANIEL FORD,
Defendant in Error.

No. 105.
Oct. T., 1884.

Brief in behalf of Plaintiff in Error.

STATEMENT.

This record is brought here by a writ of error directed to the Supreme Court of the State of New York to reverse a judgment of that Court in favor of the defendant Ford entered upon a remittitur of the Court of Appeals of that State (Rec., p. 1).

The action was brought in New York upon a judgment alleged in the complaint to have been recovered in the United States Circuit Court for the Northern District of Ohio by Charles Cochrane against the plaintiff here, but the defendant in the State Courts (Record, p. 3).

From the complaint it appeared that Cochrane was a resident of Ohio, and the defendant a corporation, resident in, and citizen of, New York. The complaint did not aver any *service* of original process upon the defendant (plaintiff here) in Ohio, but alleged the defendant's *appearance* therein, and alleged an assignment of the judgment by Cochrane to Ford, the plaintiff (Record, p. 3, fol. 3). The answer averred that there was *never any personal service* of process on the company (Record, p. 4, fol. 4), and put the judgment and assignment in issue (Record, p. 4, fol. 5).

At the first term at which the cause could be tried, being the first term after issue joined, and before trial, the plaintiff in error presented to the Court a petition and bond for removal of the cause to the United States Circuit Court for the Northern District of New York (Record, p. 6), pursuant to the Act of Congress, passed March 3, 1875, which has *enlarged* both the jurisdiction of the U. S. Circuit Court, and the *grounds of removal* to the full limit of constitutional power (see Brief, pp. 6).

The bond was approved the day before the trial (Record, fol. 13). The plaintiff in error claimed removal under the Act of 1875, on three grounds: (1) because the judgment sued on was a *federal judgment*, and the petitioner's case, therefore, was one *arising under the Constitution or laws of the United States;* (2) because the petition showed that the plaintiff in error was "never an inhabitant of Ohio, or found therein, nor was process served on any of its officers," and that § 739 of the U. S. Rev. Statutes denied *jurisdiction* to the U. S. Circuit Court in such cases; and that this defense presented a federal question concerning the construction and effect of that law (Record, p. 7), and the case was, therefore, within the same clause of the Act of 1875 above quoted; (3) because the assignment to Ford, the plaintiff in the State Court, was *merely colorable*, and the controversy was really "*between citizens of different States* (Record, p. 7, fol. 10).

The Judge presiding at the Circuit, after considering the application, on the morning on which the cause was called for trial, rendered his opinion (Record, pp.

5, 6), to the effect that the petition and bond were not operative to transfer the cause, and directed a jury to be impaneled, to which order and direction counsel for the petitioner, (plaintiff here) excepted on the ground that the cause had been transferred to the Federal Court (fol. 8.). A jury being impaneled, defendant objected to any further proceedings and excepted to the ruling of the Court (fol. 13) and introduced in evidence the petition and bond (fol. 8). These papers were filed prior to the trial (fol. 3).

Counsel for defendant then objected to further proceedings and duly excepted (fol. 3).

Upon the trial the Court would not permit the defendant to go into the question of the validity and consideration of the assignment to Ford of the Cochrane judgment (Record, p. 29, top).

Errors Assigned.

That after the filing of the petition and bond the cause was *ipso facto* removed to the United States Circuit Court and all subsequent proceedings in the Courts of the State of New York were absolutely void.

The entry of the judgment against the plaintiff in error after it had duly filed its petition for removal.

FIRST POINT.

The petition and bond for the removal of this cause to the United States Circuit Court were in conformity with the Act of March 3, 1875, and the State Court was thereby ousted of jurisdiction and all fur-

ther proceedings were coram non judice, and the judgment should be reversed.

Steamship Co. vs. Tugman, 106 U. S., 118 and cases below.

R. R. v. Koontz, 104 U.S., 5 and 18

In the consideration of this subject there are certain preliminary points which have been so often adjudged that only a brief reference to them is necessary, viz.:

I.

If the petition presents a case for removal within the act of Congress all further proceedings by the State Court are *coram non judice* and void. 104 U.S., 14.

In Gordon *vs.* Longest, 16 Peters, 97, the Court say (p. 104): "*Every step subsequently taken in the exercise of a jurisdiction in the case, whether in the same court or Court of Appeals, was coram non judice.*"

To the same effect are:

Kanouse vs. Martin, 15 How. U. S., 198.
Insurance Co. vs. Dunn, 19 Wall., 214.
French vs. Hay, 22 Wall., 250.
Fisk vs. Union Pacific R. R., 6 Blatch C. C., 362, 394–9.
Hatch vs. Chicago Co., 6 Blatch., 105, 118.

The decisions of the State Courts are to the same effect; and the Court of Appeals of the State of New York has repeatedly declared that such "subsequent proceedings are *coram non judice* and void," and has on that ground reversed the judgments below.

Shaft vs. The Phœnix, 67 N. Y., 544, 550 (per FOLGER J.)
Taylor vs. Shew, 54 N. Y., 75–77 (per EARL, J).
Stevens vs. The Phœnix, 41 N. Y., 150, 154 (per MASON, J.).
Bell vs. Dix, 49 N. Y., 232, 237 (per ALLEN, J.).
Merritt vs. Van Sanf., 34 N. Y., 205.

II.

The proceedings for removal are *ex parte*, and based upon the *pleadings and the facts stated in the petition* alone; if these show that a Federal question is involved or any other ground for removal under the act of Congress, the cause is to be removed. *Any dispute, as to the facts stated in the petition, and the determination of the federal jurisdiction dependent on any point of law involved must be heard and decided in the Federal Court.* Mitchell v. Clark, 110 U.S., 641, mid.

104 U.S. 14-15.

In Fisk vs. Union Pacific, 8 Blatch. C. C. Rep., 243 **Nelson**, J., says: "No affidavits can be read before the State Courts in opposition. The application on the petition is *ex parte*, and depends upon the papers upon which it is founded, and if they are regular and conform to the requirements of the statute the (State) Court has no discretion—the act is peremptory."

Again, in Dennistown vs. Draper (5 Blatch., C. C., 336, 338), **Nelson**, J., says: "In cases where the proceedings are in conformity with the act, the removal is imperative, both upon the State and Circuit Courts; and if the facts upon which the removal is based are seriously contested, it must be done in a formal manner by pleadings and proofs *in the latter Court. The question of jurisdiction belongs to the Federal Court, and must be heard and determined there.*"

See Wormser vs. Dahlman, 16 Blatch., 319.

In Ilius vs. N. H. R. R. (3 Kern., 597-8), **Comstock**, J., says: "The question of *jurisdiction* must be decided by the *Circuit Court itself;*" and in Bell vs. Dix, 49 N. Y., 237, **Allen**, J., says the same thing; and **Grover**, J., in the same case, says: "These and other questions *the petitioner has an absolute legal right to have passed upon by the Courts of the United States*" (p. 242).

If it finally appears in the Circuit Court that the action has been improperly removed it is remanded back after hearing objections there; such are the decisions above cited, and such is the express provision of the Act of 1875, by section 5 (18 Stat. at Large, part 3, page 471).

It follows from this that *none of the subsequent proceedings*, nor the *former judgment record* put in evidence upon the trial in this case, can be appealed to to sustain the refusal of removal.

III.

The foregoing decisions are all strictly applicable to petitions under the Act of 1875, because the language of this act as to the *effect* of presenting a petition and bond is *identical with that of the former acts* of 1789, 1833, 1866 and 1867. In all these acts it is alike made "*the duty of the State Court to accept the petition* and PROCEED NO FURTHER IN THE SUIT."

Act of 1875 (18 Stat. at Large, part 3, p. 470, § 2).
Act of 1789 (1 Stat. at Large, p. 79, § 12).
Act of 1833 (4 Stat. at Large, p. 633, § 3).
Act of 1866 (14 Stat. at Large, p. 306, ch. 288).
Act of 1867 (14 Stat. at Large, p. 558, ch. 196).

On this subject, therefore, the only substantial question before the Court is this: Did the *petition* and the pleadings in this action present a *Federal question, i. e.*, a *claim* or a *defense*, "arising under the Constitution or laws of the United States," or a controversy substantially "between citizens of different States," within the Act of 1875.

It is submitted they did so under two clauses of that act.

FIRST. (*a*) The *claim* was upon a Federal judgment founded upon and solely arising under the Constitution and Laws of the United States; and also (*b*) besides a general denial, a *defense* under a specific United States law, viz., § 739 of the U. S. Rev. Stat.

SECOND. A suit substantially "between citizens of different States," the assignment from Cochrane, of Ohio, to the plaintiff, being "*merely colorable*, and for Cochrane's benefit" (fol. 10).

A fact which plaintiff in error was not permitted to show upon the trial (fol. 44 of Record).

Section 2, of the Act of 1875, provides:

"§ 2. That any suit of a civil nature now pending or hereafter brought in any State Court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and *arising under the constitution or laws of the United States;* or in which there may be a controversy *between citizens of different States*, * * * *either party* may remove said suit into the Circuit Court of the United States, for the proper district."

"§ 3. That whenever either party * * entitled to remove any suit (as aforesaid) shall make and file a petition in the State Court * * * before the trial thereof, for such removal, and make and file therewith a bond, with good and sufficient surety, &c., * * * *it shall then be the duty of the State Court to accept said petition* and bond, and PROCEED NO FURTHER IN THE SUIT."

Notwithstanding this provision and the compliance with it by the plaintiffs in error, the State Court did further proceed.

SECOND POINT.

The claim against plaintiff in error being solely upon a Federal judgment, which was put in issue by the answer (fol. 4), presented

a case "arising under the Constitution or laws of the United States."

(*a*) As a ground of *removal*, this clause is first found in the Act of 1875; but the language used is the language of the Constitution of the United States, in its grant of judicial power.

U. S. Constitution, Art. 3, § 2.

It is the same language also that is used in § 1 of the Act of 1875, in granting to the Circuit Courts an *extension of original jurisdiction*, manifestly designed to be *co-extensive with the constitutional limit of power.*

Cruikshank v. Bk., 16 Fed. Rep. 888
Conner v. Scott, 4 Dillon, 242

Prior to the Act of 1875, the original jurisdiction of the Circuit Courts had been conferred by Congress in *partial terms*, and in specific cases only (see U. S. Rev. St., Tit. 13, Ch. 7, § 629). But the Act of 1875 (§ 1) for the first time extended their jurisdiction (concurrent with State Courts) to the *full limit of the Constitution*, viz., "to all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, $500, *and arising under the Constitution or laws of the United States*, or treaties made," &c., &c., in the very language of the Constitution itself.

By § 2 of the same act a right of *removal* from the State Courts is given to either party in cases described by *the same identical language.*

It is manifest, therefore, that this phrase "arising under the Constitution or laws of the United States," &c., is used not only in the *same sense* in § 1 and § 2 of this act, but in the same sense in which it has long been *judicially interpreted* in the Constitution of the United States.

The result is a harmonious Federal judicial system under which the Circuit Courts have a jurisdiction as wide as the constitutional power of Congress to confer, and under which *either party has a co-extensive right of trial at his option in the Federal Courts alone.*

Ruckman vs. Ruckman, 1 Fed. Report., 589.

(*b*) The phrase "cases arising under the Constitution or laws of the United States," has long been held to include *all suits dependent upon or involving the construction of* the Constitution or *any law of the* United States, whether by way of *claim* or *defense*, in *whole* or in *part.*

Bank v. Roberts, 4 Conn., 323

Cohens vs. Virginia, 6 Wheat., 264, 379, citing Cases.
United States vs. Peters, 5 Cranch, 115.
Ableman vs. Booth, 21 How., U. S., 506.
The Mayor vs. Cooper, 6 Wall., 247, 252.
Martin vs. Hunter's Lessees, 1 Wheat., 304.
R.R. v. Miss., 102 U.S., 141, & cases.

"Nor is it any objection that questions are involved
which are not all of a Federal chara
latter exist, if there be a single suc
mass, it is sufficient" (Mayor vs. Co

In the case of Tennessee vs. Da
264, Strong, J., says (in a case of
arising under the laws of the Unite
grow out of the legislation of Cong
constitute the right, or *privilege*, or *a*
or *defense* of the party, in whole c
they are asserted" (Story on the C

Both parties claim u
federal statutes.
Tenn. v. Davis, 100 US.
Davis v. So. Car., 107 US. 60
Mitchel v. Clark, 110 " 64
Houser v. Clayton, 3
Ellis v. Norton, 16 F.R.,

Orner v. Sanders, 3

The same view was applied, in a
the Circuit Court of Kansas, on
by McCrary, C. J., in August, 1880.
Allen vs. Atchinson, Colorado & Pacific Railroad (reported in Federal Reporter, vol. 3, p. 545), where he says "It is manifest that the words 'arising under the Constitution or laws of the United States' *mean the same thing* in the Act of Congress and in the constitutional provision," and he cites and applies the language of Strong, J., above quoted, to a claim for land damages by the plaintiff, as alleged owner under a *law of Congress.* Ills. v. RR. 16 Fed Rep. 886-7, Harlan, J. Westn. Un. v. Nat Tel., 19 Id., 561.

(*c*) It is manifest, therefore, that the plaintiff's own *claim*, viz., upon a judgment recovered *in a Federal Court*, presents a case "arising under the Constitution

Osborn v. Bank, 9 Wheat., 823-4, et seq.
Un. Pac. v. McComb, 1 Fed. Rep., 780, top.
Cruikshank v. Bk., 16 " 888

a case "arising under the Constitution or laws of the United States."

(*a*) As a ground of *removal*, this clause is first found in the Act of 1875; but the language used is the language of the Constitution of the United States, in its grant of judicial power.

U. S. Constitution, Art. 3, § 2.

It is the same language also that is used in § 1 of the Act of 1875, in granting to the Circuit Courts an *extension of original jurisdiction*, manifestly designed to be *co-extensive with the constitutional limit of power.*

Cruikshank v. Bk, 16 Fed. Rep. 888
Conner v. Scott, 4 Dillon, 242

Prior to the Act of 1875, the original jurisdiction of the Circuit Courts had been conferred by Congress in *partial terms*, and in specific cases only (see U. S. Rev. St., Tit. 13, Ch. 7, § 629). But the Act of 1875 (§ 1) for the first time extended their jurisdiction (concurrent with State Courts) to the *full limit of the Constitution*, viz., "to all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, $500, *and arising under the Constitution or laws of the United States*, or treaties made," &c., &c., in the very language of the Constitution itself.

By § 2 of the same act a right of *removal* from the State Courts is given to either party in cases described by *the same identical language.*

It is manifest, therefore, that this phrase "arising under the Constitution or laws of the United States," &c., is used not only in the *same sense* in § 1 and § 2 of this act, but in the same sense in which it has long been *judicially interpreted* in the Constitution of the United States.

The result is a harmonious Federal judicial system under which the Circuit Courts have a jurisdiction as wide as the constitutional power of Congress to confer, and under which *either party has a co-extensive right of trial at his option in the Federal Courts alone.*

Ruckman vs. Ruckman, 1 Fed. Report., 589.

(*b*) The phrase "cases arising under the Constitution or laws of the United States," has long been held to include *all suits dependent upon or involving the construction of* the Constitution or *any law of the* United States, whether by way of *claim* or *defense*, in *whole* or in *part*.

Bank v. Roberts, 4 Conn., 323

Cohens vs. Virginia, 6 Wheat., 264, 379, citing Cases.
United States vs. Peters, 5 Cranch, 115.
Ableman vs. Booth, 21 How., U. S., 506.
The Mayor vs. Cooper, 6 Wall., 247, 252.
Martin vs. Hunter's Lessees, 1 Wheat., 304.
R. R. v. Miss., 102 U.S., 141, & cases.

"Nor is it any objection that questions are involved which are not all of a Federal character. If *one* of the latter exist, if there be a single such ingredient in the mass, it is sufficient" (Mayor vs. Cooper, 6 Wall., 252.)

In the case of Tennessee vs. Davis, 100 U. S. Rep., 264, STRONG, J., says (in a case of removal): "Cases arising under the laws of the United States are *such as grow out of the legislation of Congress*, whether *they constitute the right*, or *privilege*, or *claim*, or protection, or *defense* of the party, in whole or in part, by whom they are asserted" (Story on the Const., § 1647).

Strong, J. in Hodgson v. Millward, 3 Grant Cas., 416

The same view was applied, in a case of removal, in the Circuit Court of Kansas, on a motion to *remand* by MCCRARY, C. J., in August, 1880, in the case of Van Allen vs. Atchinson, Colorado & Pacific Railroad (reported in Federal Reporter, vol. 3, p. 545), where he says "It is manifest that the words 'arising under the Constitution or laws of the United States' *mean the same thing* in the Act of Congress and in the constitutional provision," and he cites and applies the language of STRONG, J., above quoted, to a claim for land damages by the plaintiff, as alleged owner under a *law of Congress*. Ills. v. RR. 16 Fed Rep. 886-7, Harlan, J.
Westn Un. v. Nat Tel., 19 Id., 561.

(*c*) It is manifest, therefore, that the plaintiff's own *claim*, viz., upon a judgment recovered *in a Federal Court*, presents a case "arising under the Constitution

Osborn v. Bank, 9 Wheat., 823-4, et seq.
Un. Pac. v. McComb, 1 Fed. Rep., 780, top.
Cruikshank v. Bk., 16 " 888

or Laws of the United States," within the meaning judicially given to those words by the Supreme Court, almost from the foundation of the Government.

The Circuit Court of Ohio, which rendered the judgment, is a Court of *limited* jurisdiction; it is the creature of the Constitution and laws of Congress; its *powers* depend upon them solely, and so does the *validity* of its judgments, as well also as all the *respect*, the *force*, and the *effect* which are to be given to it in this suit, or in any other jurisdiction.

Any right under such a Federal judgment grows solely "out of the legislation of Congress," and arises solely "under the Constitution and Laws of the United States." It has no basis or effect whatever, except in them alone.

Both parties claim under federal statutes.
Tenn. v. Davis, 100 U.S. 264
Davis v. So. Car., 107 U.S. 600
Mitchel v. Clark, 110 " 642
Houser v. Clayton, 3 Woods 273
Ellis v. Norton, 16 F.R., 5-6

This judgment was put in issue by the answer (fols. 4-5), and the petition for removal showed that its validity was contested, and the jurisdiction of the Court to render it denied (fol. 9).

The claim, therefore, from first to last, not in a single element, but in every part of it, depended upon and "arises out of the Constitution and Laws of the United States."

Orner v. Sanders, 3 Dillon 284 (Suit by int. rev. collr. upon depy.'s bond.)

Upon such a judgment a suit could be plainly brought in the U. S. Circuit Court, for the proper district, *irrespective* of the *citizenship* of the parties, under this *new and extended* jurisdiction given by the Act of 1875 (§ 1), and hence the *correlative right of removal* exists under § 2 of that act.

Whether this claim of the original defendant was or was not sound is, however, not the question. Whether sound or not it was entitled to have it considered and determined by a Federal Court.

State v. C., B. & Q., 16 Fed. Rep., 706; Harlan, Drummond et al, JJ.
Hatch v. Willamette, 11 The Reporter, 630-1
Herbert v. Lefevre, 31 La. An., 363.

THIRD POINT.

The petition of removal presented a Federal question in the necessary consideration and construction of the effect of Section 739 of the U. S. Revised Statutes, as a defense against the jurisdiction of the Circuit Court (fol. 9). This special defense was, under this Act of Congress, a separate ground of removal, as presenting "a case arising under the Constitution or Laws of the United States."

"Such a case is presented," says MARSHALL, C. J., in Cohens vs. Virginia (6 Wheat., 379), "whenever its correct decision depends upon the right construction of either" (see also the cases cited under the Second Point).

(*a*) If there had been no *appearance* in the suit in Ohio, no doubt could exist under this act that the Circuit Court, according to the statements of the petition, had no jurisdiction whatever. The answer denied *personal service* of process on the defendant (fol. 4), *i. e.*, service on any officer or person legally representing the company. The petition states that "process was never served personally upon the defendant in said action in Ohio, or upon any of its officers, *nor was the defendant ever an inhabitant of Ohio, or found therein*" (fol. 9).

The complaint did not allege personal service, but only that the defendant *appeared* (fol. 3).

(*b*) The delivery of process at the house of a pretended *agent* of the plaintiff in error in Ohio (who was a partner of the plaintiff Cochrane, and whose authority had been terminated months before (fol. 23), is not only no compliance with the act, but *was not before the Court on the application to remove*, but only appeared on the *trial* afterwards, and cannot therefore be considered on this question (*ante* II., p. 4).

The appearance was practically a *constrained* one. It could not risk a judgment of $20,000 by default upon doubts about a peculiar Ohio law concerning agents. But, however this might be the effect of it depended upon the construction of a Federal statute.

(*c*) It was a question upon this § 739, Rev. Statutes, whether the *appearance* constituted a "*finding* of the defendant within the State," or gave to the Court *jurisdiction* notwithstanding this section.

That point was necessarily involved in the trial of the action. The Justice, in directing a verdict for the plaintiff, passed upon the point adversely to the defendant. *The plaintiff in error was entitled to have it passed upon by the Federal tribunals;* for the defense invoked was a *Federal law*, which, if applicable, defeated the claim. It was therefore a case arising under the constitution and laws of the United States.

Mayor vs. Cooper, 6 Wall., 252.
Cohens vs. Virginia, 6 Wheat., 379, and other cases above cited.

(*d*) In courts of *general* jurisdiction it is settled that a voluntary appearance is equivalent to service of process, but it is different in courts of a *limited* jurisdiction (14 Pet. 65).

In Boswell's Lessee vs. Otis (9 How., U. S., 348), McLean, J., says: "On a voluntary appearance, a court of general jurisdiction will settle the matter in controversy. *But this principle does not apply to a special jurisdiction unauthorized by statute.*"

And it has been adjudged that *consent* does not give the Circuit Court jurisdiction.

Gardner vs. Madrazo, 1 Pet., 121.

And if consent cannot give jurisdiction, it is difficult to see how *appearance* can do so in a court of limited jurisdiction, and it has been so held.

Decker vs. N. Y. Belting Co., 11 Blatch. C. C., 76.
Day vs. Newark India Rubber Co., 1 Blatch., 628.
R.R. v. Swan, 111 U.S., 382, et seq.

(*e*) The cases in the United States Courts are not altogether harmonious on this subject. But it is not our task here nor the task of the State Court to reconcile or determine them, nor to pass upon this question at all. When presented by the petitioner below, it was the duty of the Court "*to proceed no further.*" The question involved was a *Federal one* and it belonged to the Federal Court to determine it upon the petition of either party.

FOURTH POINT.

The petition showed (fol. 10) that the suit was in substance and effect "between citizens of different States," viz., Cochrane of Ohio and the Plaintiff in error of New York, and the cause was removable on this ground.

(*a*) The petition states that the assignment set up in the complaint was "*merely colorable,*" for Cochrane's benefit, and to defeat, if possible, a removal to the Federal Court (fol. 10). The answer put the assignment in issue (fol 5).

(*b*) It has been long held that the jurisdiction of the Federal Courts under this clause of removal is to be determined by the citizenship of the actual parties for whose benefit the suit is brought, and that *colorable assignments shall be disregarded.*

Smith vs. Kernochen, 7 How., U. S., 198.
Jones vs. League, 18 How., U. S., 76, 81.
Ruckman vs. Palisade Co., 1 Fed. Rep., 367.
Barney v. Balto, 6 Wall, 288.

In the former case, NELSON, J., says: "The objection in these cases is, that the assignor or grantor, as the case may be, *is the real party in the suit, and the plaintiff on the record but nominal and colorable. The suit is then, in fact,* A CONTROVERSY BETWEEN THE FORMER AND THE DEFENDANTS, *notwithstanding the conveyance.*

In Ruckman vs. Palisade (1 Fed. Rep., 367), where the action was in the name of a *next friend* of a married woman, NIXON, J., says (p. 371): "In ascertaining the *actual parties to the controversy*, we must look at the *substance* and not at the mere *form*."

The grounds upon which these cases were decided are conclusive, we submit, as respects this petition and its very *full* allegations of this *colorable assignment.* No plainer statement is possible than that this suit was in substance and effect between citizens of different States. And the right of the petitioner to trial in the Federal Courts could not be defeated by a "merely colorable" and sham assignment, while Cochrane was the real party in interest.

The State Court had no right to go on with a trial on this question. The subject was to be heard in the Federal Court upon removal; and if the allegations of the petition were denied, the remedy was by motion in the Circuit Court to remand.

Act of 1875, § 5.

FIFTH POINT.

The due presentment of the petition and bond for removal, before trial, being proved on the trial as a preliminary defense (fol. 13), the further proceedings on the trial were coram non judice and void. There was no waiver of this defense.

SIXTH POINT.

The grounds assigned by the State Judge for refusing removal are invalid.

He says: "The statute (§ 739), as it stands, will be adopted as the law applicable to this case. * * * *I shall, of course, adopt the Statute of the United States as the law in determining the case, and allow no contest upon that.*"

Thus the Justice conceded, apparently, that the case depended upon and was *subject to the United States laws;* but he denied a removal of the cause because, apparently, he proposed to *observe* those laws. Is a case, then, to be removed only when the Justice proposes to disregarded or to violate the laws of the United States?

The cardinal error of the Justice below was, as we submit, in passing upon the Federal questions himself instead of referring them to the Federal Court where their determination belonged (see *ante* II., p. 4).

SEVENTH POINT.

Following in this erroneous idea the plaintiff in error was not permitted upon the trial to show that the assignment to Ford was merely colorable, i. e., a fraud upon the law and upon the right of removal.

(See cases cited under Fourth Point).

The questions asked and disallowed, at p. 29 of the record, were of the utmost materiality to show that

Cochrane was still the actual litigant, and the assignment *pro forma* only.

The execution of the assignment and its recitals have no binding force upon the plaintiff in error. It is *res inter alios acta*. The assignment alleged a valuable consideration. To show it a *sham*, it was material to *contradict* that recital; and also to prove that it was not intended as a *gift* even. The questions were ruled out on the ground, apparently, that the assignment was unimpeachable. It was not required to continue other questions when two very material and important considerations on the subject had been thus excluded.

If a mere *pro forma* colorable assignment is to be held unimpeachable, and not to be enquired into, then the cases cited under our fourth point are all wrong.

STEPHEN G. CLARKE,
Edwin B. Smith WM. STANLEY,
Of Counsel for Plaintiff in Error.

114-635

Supreme Court.

OF THE

UNITED STATES.

DANIEL W. FORD, *Defendant in Error*,

against

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, OF NEW YORK,

Plaintiff in Error.

This is a writ of error, addressed to the Supreme Court of the State of New York to review a judgment obtained in the Circuit Court of Rensselaer County in that State, and affirmed by the General Term of the Supreme Court, and the Court of Appeals.

STATEMENT OF FACTS.

On the 12th day of April, 1876, an action was commenced by one Charles Cochran, against the plaintiff in error, in the United States Circuit Court for the Northern District of Ohio. The summons was served on the general agent of the defendant for the State of Ohio. Afterwards, the defendant duly appeared by its solicitor, and filed an answer to the petition. The petition was amended, by leave of the Court, and the defendant, by a like leave, filed an amended answer. The plaintiff filed a reply, and, upon the issue, so framed, the case was tried for nearly a fortnight, and a verdict was rendered for the plaintiff for $3,100 damages. A motion for a new trial was made, and denied, and on the tenth day of October, 1878, judgment was entered for the damages above mentioned with costs. Afterwards the said Cochran assigned the said judgment to the plaintiff in this action.

Afterwards, and on the 3d day of December, 1878, this action, upon said judgment, was commenced in the Supreme Court of the State of New York. The defendant answered, denying knowledge, or information, sufficient to form a belief, *as to the entry of the judgment*, and alleging that process was not *personally served* on the defendant. Defendant also denied knowledge or information, sufficient to form a belief, as to the alleged assignment to the plaintiff.

At the term of the Rensselaer County Circuit Court, for which the case was first noticed for trial, the defendant presented a petition and bond, for the removal of the case into the United States Circuit Court, for the Northern District of New York. The Court decided to go on with the case, notwithstanding the petition. The plaintiff then introduced the judgment and assignment, and the Court directed a verdict for the plaintiff, for the amount of the judgment and interest. Judgment was duly entered on the verdict, and the defendant appealed to the General Term of the Supreme Court, where the judgment was affirmed. The defendant then appealed to the Court of Appeals, where the judgment was again affirmed, and the defendant brought error to this Court, on the ground that the Rensselaer County Circuit Court erred in proceeding with the case, after the presentment, by the defendant, of the petition and bond, for the removal of the case to the Circuit Court of the United States.

POINTS FOR RESPONDENT.

I.

It was not necessary to deny the proposition of the learned counsel for the appellant, that, *where a proper case for removal is made*, the presentment of the petition and bond ousts the State Court of jurisdiction, and that all further proceedings are *coram non judice.* This is true, but it is equally true that a *proper* case must be made. The State Court is not to be ousted by a mere general statement of the party, that it is a case arising under the Contsitution or statutes of the United States, or in which the controversy is between citizens of different states. The State Court is not a mere dummy, sitting to register any order for removal, that a party may ask for. Either by the pleadings, or by the petition, *facts* must appear in evidence, showing that the case is one that comes within the terms of the Act of Congress. Mere conclusions or mere guess work is not enough.

Gold. Washing & Water Co., v. Keyes, 96, U. S., 199.
In Re, Wells, 17, Albany Law Journal, 111.
Removal cases, 100, U. S,, 474.

"The State Court," said Mr. Justice Bradley in the Wells case, above cited, "surely is not bound "to shut its eyes, and yield to every application "that comes to it."

And, in the case last above cited, this Court said, "We fully recognize the principle heretofore as-"serted, in many cases, that the State Court is not "required to let go its jurisdiction, until a case is "made, which upon its face shows that the peti-"tioner can remove the cause, as a matter of right." If then no case was made which, upon its' face, showed that the defendent was entitled to a removal, the State Court was bound to go on with the trial, and was under no obligation to stay proceedings until the case should be remanded by the Circuit Court.

II

The proposition of the appellant that the case arose under the statutes of the United States, because the judgment was rendered in the United States Circuit Court, is clearly untenable. A case is not to be removed simply because, in its progress, a construction of the Constitution, or a law of the United States, may be necessary, unless it, in part at least, arises out of a *controversy* in regard to the operation, or effect of some provision of the Constitution, or laws, upon the facts involved, and the petition must show the essential facts, in regard to which such controversy exists.

Gold, Washing & Water Co., v. Keyes, 96 U. S., 199

The petition does not set forth how the mere fact that this judgment was recovered in a court of the United States, instead of a State Court, can give rise to any controversy between the parties. It is true that the jurisdiction and modes of procedure of the Court are fixed by the law of the United States, but the fact that the suit is in a United States Court does not by any means show that the construction of any such law is a matter of *controversy*. For aught that appears the parties may agree in every respect as to the construction of such laws, and if so, there is no case for removal.

III.

The petition does not show that there was any "real, or substantial controversy," as to the construction of Sect. 739 of the Revised Statutes of the Unied States. That section provides that no suit shall be *commenced* against an inhabitant of the United States, except in the district where he resides, or in which he may be personally served.

The appellant asserts that the trial, resulting in the judgment sued on, being in the Northern District of Ohio, while the defendant is a New York corporation, the judgment was obtained without acquiring jurisdiction of the defendant, and that a judgment for the plaintiff in this case could not be given without giving a construction to section 739 unfavorable to the defendant.

The question then is this. Is it necessary to construe section 739 of the United States Revised Statutes, in order to try the issues presented by the pleadings in this case ? For the controversy to be tried must be raised by the pleadings, and if it is not there, it does not exist, for the purposes of the trial. In the first place, no such defence is set up in the answer. There is no allegation that the Ohio Court acted without jurisdiction, or that the defendant was not *legally* served with process. The complainant explicitly alleges the commencement of the suit, and that the defendant appeared and answered, and then appeared at the trial of the case. (Fol.).

The answer admits all this, but says there never was any "personal service" of process on the defendant. As there can be no such thing as "personal service" on a corporation aggregate, this answer was mere nonsense, and trifling with the Court. The defendant did not dare to allege that the service was not upon the proper person to obtain jurisdiction of the company defendant, but it alleges that the service was not "personal service" on the defendant, as though there could be any service on a corporation, except on its agent.

Again, the defendant, or plaintiff in error, at the trial in Ohio, appeared, answered and tried the case.

A familiar common law rule, which does not depend on any statute of the United States, declares that "consent confers jurisdiction of the person." Therefore the trial Court, when it gave judgment in this action, did not construe section 739 of the Revised Statutes, or any other statute, against the defendant. It held that, conceding the suit in Ohio to have been improperly *commenced*, and that the plaintiff, in that suit, could not have obtained a valid judgment by default, yet when the defendant voluntarily appeared, and tried the case, the judgment was as effectual as though is were founded on a valid process. And this, upon the principle, that a party shall not appear and try a case, and take his chance of succeeding, and then, when he is beaten, say that the Court did not have jurisdiction of his person. And this principle applies to a foreign corporation as much as to any other party.

McCormick v. Penn. R. R. Co., 40 N. Y. 303.
Gibbs v. Queen Ins. Co., 63 N. Y. 114.
Lafayette Ins. Co., v. French, 18 How., U. S. 404.

In the case last cited, this Court used the following language: "And so if a corporation, though in "Indiana, should appoint an attorney to appear in "an action brought in Ohio, and the attorney should "appear, the Court would have jurisdiction to render a judgment, in all respects as obligatory, as if "the defendant were within the State. The inquiry is not, whether the defendant was personally within the State, but whether he, or some "one authorized to act for him, in reference to the "suit, had notice and appeared."

The point is made, by the plaintiff in error, that a Circuit Court of the United States is not a Court of general jurisdiction, and therefore a voluntary appearance does not confer jurisdiction of the person. It has been settled by repeated decisions that the Circuit Court *is* a court of general jurisdiction.

Ruckman v. Cowell, 1 N. Y., 505.
Chemung Canal Bank v Judson, 8 N. Y., 254.
Exparte Watkins, 3 Peters, 193.

But it is utterly immaterial, as to this point, whether a circuit court is one of general jurisdiction or not. The only difference is, that, in the one case jurisdiction is presumed, and, in the other, it must be affirmatively proved. In either case, a voluntary appearance, and *trial of the case without objection*, as to the jurisdiction of the Court, precludes the defendant from questioning the judgment in a collateral action.

The case cited by the plaintiff in error, (14 Peters 65) merely holds that an appearance of a corporation by an attorney, for the purpose of pleading that the Court had *no* jurisdiction, was not such an appearance as precluded it from raising the question of jurisdiction. I suppose that nobody will question that decision; it is certainly not necessary to question it in this case, when a party has appeared, and tried the case, and it is sought to question the jurisdiction of the Court, in a collateral action.

IV.

The allegation in the petition that the assignment was "colorable," and for the benefit of Cochran, the assignor, furnished no reason why the case should have been transferred to the United States Court.

1. The petition for removal, as to this point, is entirely upon general information and belief. The defendant, in the Court below, alleged that it was informed and believed that the assignment was made without consideration, and that Cochran, the assignor, was the real party in interest, and that the assignment was made to avoid the necessity for giving security for costs, and to prevent the transfer of this action to the United States Courts. Who it was that told these things to the petitioner, or why the petitioner (who is a corporation) should believe them, is not, in any way disclosed.

The proceeding is *ex parte*, as claimed by the plaintiff in error, and no opportunity for the use of answering affidavits is given to the plaintiff. It is clear, then, that the petition for removal must state facts in such a way as to be *evidence* to the Court that a case is made coming within the U. S. statute. The attempt is made to oust the jurisdiction of a court in which the action is properly brought. That cannot be done without some *evidence* of the facts on which the motion for removal is based. That evidence may appear in the record; if not, it must appear by affidavit or by a verified petition.

Gold Washing & Water Co. v. Keyes, 96 U. S., 199
Ins. Co. v. Pechner, 95 U. S., 183.
Amory v. Amory, 95 U. S., 186.

Nothing is better settled, than that an affidavit which merely states hearsay, without disclosing its source, is no evidence at all. That the plaintiff in error was informed, (if a corporation can be informed,) and believed, (if a corporation can believe,) that the assignment was colorable, and for the benefit of the assignor, was, in no sense, evidence of that fact. The information might have have been given by one who knew nothing about the facts; the defendant might have believed without any reason for believing.

Ex parte Haynes 18 Wend., 611.
Matter of Bliss, 7 Hill, 187.
Whitlock v. Roth, 10 Barb., 78.

In the case last cited, it was held that, if the facts are not within the personal knowledge of the affiant, he must state in what way the information was derived, so that the *Court* can see whether it was likely to be reliable, and whether the affiant was justified in believing it. The principle applies with full force to a motion of this character. The plaintiff in error sought to oust the jurisdiction of a State Court, upon the ground that an assignment was without consideration, and for the benefit of the assignor. The only parties who could, ordinarily, know the truth of this allegation, were the assignor and the assignee themselves. The defendant below did not pretend that its information was derived from either of those parties, and it was no doubt a mere guess.

Allegations on information and belief are permitted in pleadings and affidavits, where the object is to obtain an admission, or contradiction, from the other party. There they are properly held to be of some weight, unless contradicted, but in this *ex-parte* proceeding, where the plaintiff below had no opportunity to put in answering affidavits, such statements were utterly inadmissible.

Quincey v. Foote, 1 Barb., Ch. 496.

2. The application for removal, under the statute must be made on the ground that the issue, about to be tried in the State Court, involves a controversy between citizens of different states, in this case between a citizen of Ohio and a citizen of New York. This conclusion is founded on the statement in the petition that the assignment was colorable, and that the citizen of Ohio still remained the owner of the judgment, and was, in fact, prosecuting the suit in the name of the defendant in error.

This position ignores the condition of the law, in the State of New York, as it has been settled for the last thirty years. By that law every action must be brought in the name of the real party in interest, and, if the real owner of a chose in action attempts to sue in the name of a nominal assignee, that fact alone is a defense to the action.

N. Y. Code of Procedure, Sec. 449.
Eaton v. Alger, 57 Bart., 179.
Kilmore v. Culver, 24 Bart., 656.
James v. Chalmers, 2 Selden, 215.

It is therefore clear that there could be, under the law of the State of New York, no controversy tried in the case between Cochran, the assignor of this judgment, and the defendant below. The only controversy, that could possibly be tried in this action, was between the plaintiff and defendant on the record. The facts, as to the nature of the assignment, did not show that the controversy was between the judgment debtor and the assignor of the the judgment, it only showed that the controversy, between the actual parties to the action, should have been decided in favor of the defendant below, if the defence had been properly pleaded and proved.

3. It has always been the doctrine of this Court, that, in action *at law*, the person holding the legal title was the proper person to bring the action. If,

therefore, prior to the Code of Procedure, a citizen of New York had assigned a chose in action to a citizen of Ohio, and an action had been brought against another citizen of New York in the name of the assignor, the suitcould not have been removed, on the ground that the citizen of Ohio was the real party in interest. A Court of law would only look at the legal title, in designating the parties between whom the controversy existed.

Irvine v. Lowry, 14 Peters 293.
Colson v. Lewis, 2 Wheat. 642.

Now it is well settled, in the State of New York, that the holder of a valid assignment of a chose in action, *is the real party in interest*, and the action may be brought in his name, even though he may have agreed to account, for the whole sum collected, to the assignor. The assignment conveys the *legal title*, and authorizes the assignee to maintain the action, and a judgment will be a complete protection against another action, and, whether there was any actual consideration, or not, is a question with which the defendant has nothing to do.

Allen v. Brown, 44 N. Y., 228.
Meeker v. Claghorn, 44 N. Y., 349.

The petition necessarily admits that there was an assignment, and it does not deny that it was valid, and absolute on its face. If it was valid and absolute within the decision I have cited, the plaintiff below was the holder of the legal title, and the real party in the interest, and the action was properly brought in his name. The petition states no facts, but only conclusions of law, and even they, if correctly stated, do not show that the action was not properly brought in the name of the assignee. Under the doctrine of this court, laid down in *Irvine v. Lowry*, and *Colson v. Lewis*, above cited, that, in deciding the question of removal on the ground of